Sup Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL SHANE DAVIS AND
HEATHER N. DAVIS,

Petitioners,

v.

SOUTHERN ENERGY HOMES, INC.,
a corporation,

Respondent.

**On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act (MMWA) prohibit a supplier of a consumer product from creating a binding arbitration procedure at the time of product sale?

2. Is the federal policy in favor of arbitration a sufficient basis for a court to disregard the Federal Trade Commission's interpretation of the MMWA – expressed in a legislative regulation – as prohibiting binding arbitration provisions in consumer product warranties?

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OPINIONS BELOW

The opinion of the Eleventh Circuit of Appeals is reported at *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002), and appears in the Appendix at 1-24. The order denying rehearing appears in the Appendix at 31. The district court's opinion is not published and appears in the Appendix at 25-30.

JURISDICTION

The district court had jurisdiction under 15 U.S.C. § 2310(d). The Eleventh Circuit had jurisdiction of the appeal under 9 U.S.C. § 16. The opinion of the Eleventh Circuit was issued September 19, 2002, App. at 1, and the petitioners timely filed an Application for Rehearing on October 3, 2002. The court denied rehearing on November 14, 2002. App. at 31. This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

9 U.S.C. § 2, Federal Arbitration Act.

15 U.S.C §§ 2302, 2309, 2310, Magnuson-Moss Warranty-Federal Trade Commission Improvement Act.

16 C.F.R. § 700.8, Interpretations, Warrantor's Decision as Final.

16 C.F.R. §§ 703.1, 703.5, Informal Dispute Settlement Procedures.

STATEMENT OF THE CASE

The Davises filed this action in the Circuit Court of Lowndes County, Alabama, to recover for defects in a manufactured home constructed by Southern. They alleged state-law claims for fraud, negligence, and wantonness, together with state-law and MMWA claims for breach of warranty.

They further alleged that Southern's warranty contained an arbitration provision and that they had been

required to execute arbitration provisions as part of product purchase. They alleged that these provisions violated the MMWA and its regulations and "create[d] a cause of action in favor of the plaintiffs under sections 2302 and 2310(d)(1) of title 15." Southern removed the action to the United States District Court for the Middle District of Alabama, where it filed a Motion to Compel Arbitration based on the arbitration provision in its warranty. App. at 26-27, 51.

The district court denied Southern's motion on the ground that the MMWA precludes arbitration of written warranty claims. App. at 29-30. Southern appealed, and the Eleventh Circuit reversed, holding that "the MMWA permits the enforcement of valid binding arbitration agreements within written warranties." App. at 6. The court further held that "[i]n light of the Supreme Court's acknowledgement and continual enforcement of the strong federal policy toward arbitration . . . we conclude that the FTC's interpretation of the MMWA is unreasonable, and we decline to defer to the FTC regulations of the MMWA regarding binding arbitration." App. at 23. The plaintiffs filed an Application for Rehearing, which the court denied without further opinion. App. at 31.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT ERRED BY HOLDING THAT THE MMWA ALLOWS WARRANTORS TO CREATE BINDING ARBITRATION PROCEDURES AT THE TIME OF PRODUCT SALE.

Summary. The test for determining whether a federal statute preserves a judicial forum is stated in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). "If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history,' . . . or from an inherent conflict between arbitration and the statute's underlying purposes."

Although the Eleventh Circuit correctly cited this test, it failed to give the statutory term, *dispute settlement procedure*, its generally accepted meaning, and it ignored relevant legislative history.

A. The Text: MMWA Dispute Settlement Procedures May Not Be Binding, and Arbitration is a Dispute Settlement Procedure.

1. MMWA dispute settlement procedures may not be binding. All courts that have considered the issue, including those that permit binding arbitration, have determined that MMWA dispute settlement procedures may not be binding. *See, e.g., Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 476 (5th Cir. 2002). The Eleventh Circuit likewise recognized that "any informal dispute settlement procedure must be non-binding." App. at 14.

These holdings are consistent with language of the Act. First, on a *procedural* level, the Act states that "the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he *initially* resorts to such procedure." 15 U.S.C. § 2310(a)(3). This implies that the dispute settlement procedure may not be "final" or "binding." If it were, the words requiring only that the consumer "initially resort" to the procedure would be meaningless.

Second, on an *administrative* level, the Act states that the prohibition of suit applies only if the warrantor's settlement procedure "meets the requirements of the Commission rules." 15 U.S.C. § 2310(a)(3). Since the Commission's rules prohibit binding procedures, 16 C.F.R. § 703.5(j), this language prohibits a warrantor from creating a binding procedure.

Third, on an *evidentiary* level, the Act states, "In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be *admissible in evidence*." 15 U.S.C. § 2310(a)(3). This implies that the decision will have an evidentiary, but not binding, effect.

And finally, on a *jurisdictional* level, section 2310(d) states, "Subject to subsections (a)(3) [informal dispute settlement procedures] and (e) [class actions], a consumer who is damaged . . . may bring suit for damages and other legal and equitable relief." This, of course, implies that the dispute settlement procedure may not be binding; if it were, no right to suit would exist following utilization of the procedure.

2. Arbitration is a dispute settlement procedure. The Davises argued that "Congress used the terms 'dispute settlement procedures' and 'dispute settlement mechanisms' only as generic terms, and thereby included binding arbitration as a type of alternative dispute resolution procedure." App. at 4-5. Without defining *arbitration* or *dispute settlement procedure*, the court rejected this argument, holding that arbitration "is of a different nature." App. at 15.

"In the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2070 n.5 (2002); *see INS v. Cordoza-Fonseca*, 480 U.S. 421, 431 (1987). A statute may establish an arbitration procedure without using the word "arbitration." *See Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30 (1957). The MMWA does not define the terms "dispute settlement procedure[s]," 15 U.S.C. § 2310(a)(4), "informal dispute settlement procedure[s]," 15 U.S.C. §§ 2302(a)(8), 2310(a)(2) & 2310(a)(3), and "informal dispute settlement mechanisms." 15 U.S.C. § 2310(a)(1). Thus, we must determine their "ordinary, contemporary, common meaning."

According to references published before enactment of the MMWA, *dispute settlement procedure* is a generic term that includes "all the possible means available to parties or governments for the peaceful settlement of a controversy." Katharine Side, *A Dictionary of Arbitration and Its Terms–Labor-Commercial-International: A Concise Encyclopedia of Peaceful Dispute Settlement* 73 (1970); *see* Jack C. Plano & Roy Olton, *The International Relations*

Dictionary 303 (1969) (defining United Nations *dispute settlement procedures*). "The *dispute settlement mechanism* . . . consists of a wide variety of tribunals from informal mediation to more formal conciliation, to arbitration and administrative action and finally, judicial proceedings." Alfred W. Blumrosen, *Labor Arbitration, EEOC Conciliation, and Discrimination in Employment*, 24 *The Arbitration Journal* 88, 90 (1969).

"Arbitration is a dispute-settlement procedure." *New Orleans S.S Ass'n v. General Longshore Workers*, 626 F.2d 455, 468 (5th Cir. 1980). Generally, it is the last or final step in a series of dispute settlement procedures. *See* Merton C. Bernstein, *Private Dispute Settlement: Cases and Materials on Arbitration* 2 (1968); Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 106 (3d 1973) ("Arbitration generally is the last step or terminal point of dispute settlement under union contracts."). The American Arbitration Association created a special division for consumer arbitrations, and it named that division the "National Center for *Dispute Settlement*." *See* American Arbitration Association, National Center for Dispute Settlement, *Consumer Arbitration Rules* (1971) (reprinted in National Institute for Consumer Justice, *Staff Studies* at 174-77 (1973) [hereinafter, NICJ, *Staff Studies*]).

This usage is reflected in statutes, treaties, and judicial decisions. For instance, the Omnibus Trade and Competitiveness Act of 1988 defined one of the United States' principal trade objectives as "to provide for more effective and expeditious *dispute settlement mechanisms and procedures*." 19 U.S.C. § 2901(b)(1). Both the North American Free Trade Agreement (NAFTA) and the World Trade Organization (WTO) contain disputes settlement procedures that begin with consultation and end with arbitration. *See* NAFTA, *Institutional Arrangement and Dispute Settlement Procedures*, chapt. 20, http://www.worldtradelaw.net/nafta/chap-20.pdf; 19 U.S.C. § 3311 (approving NAFTA); WTO, *Understanding on Rules and Procedures Governing the Settlement of Disputes*, http://www.worldtradelaw.net/uragreements/dsu.pdf; 19 U.S.C.

§ 3511(d)(16) (approving WTO dispute settlement procedures); 19 U.S.C. § 3533 (referring to WTO process as "*dispute settlement* panels and *procedures*").

Decisions of this Court, before enactment of the MMWA, likewise used the terms *dispute settlement procedure* and *dispute settlement mechanism* as generic terms that included arbitration. In *Detroit & Toledo Shore Line Transport. Union v. United Transport. Union*, 396 U.S. 142, 149-50 (1969), this Court said, "[The Railway Labor] Act established rather elaborate machinery for negotiation, mediation, voluntary arbitration, and conciliation. . . . There are three status quo provisions of the Act, each covering a different stage of the major *dispute settlement procedures*." *See also Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 251 (1974) ("Both agreements contained *dispute settlement procedures* leading ultimately to arbitration.").

Commenting on a binding arbitration procedure, the Court in *William E. Arnold & Co. v. Carpenters District Council*, 417 U.S. 12, 17 (1974), stated, "[T]he Board has recognized added policy justifications for deferring to the [parties'] contractual *dispute settlement mechanism*." *See also Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397, 405, 407 (1976) ("dispute-settlement procedures" and "private dispute settlement mechanisms"). The court erred in failing to give the statutory terms their ordinary meaning.

3. If arbitration is not an informal procedure, then the MMWA prohibits it. The Fifth Circuit has concluded that the FTC lacks the power to regulate "binding arbitration [because it] is not normally considered an *informal* procedure." *Walton v. Rose Mobile Homes, LLC*, 298 F.3d 470, 477 (5th Cir. 2002). This analysis is incorrect for two reasons.

First, courts and commentators – and even the American Arbitration Association – regard arbitration as an informal procedure. The House Report on the Dispute Resolution Act, passed in 1980, referred to "arbitration, mediation, and conciliation" as "informal methods" of

dispute settlement. H.R. Rep. 96-492, pt. 1, at 14 (1979), *reprinted in* 1980 U.S.C.C.A.N. 3, 6. Writing in 1980, the President of the American Arbitration Association said, "Arbitration procedures are generally *informal.*" Robert Coulson, *Business Arbitration – What You Need to Know* 4 (1980); *see* NICJ, *Staff Studies, supra,* at 63. Finally, this court has characterized the arbitration process as one marked by "simplicity, *informality*, and expedition." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

Second, if arbitration is a formal procedure, then the language of the Act prohibits it. Section 2310(a)(4) allows the FTC to "review the bona fide operation of *any* dispute settlement procedure." "The word 'any' has an expansive meaning, that is 'one or some indiscriminately of whatever kind.'" *United States v. Gonzales,* 520 U.S. 1, 5 (1997). Thus, the FTC may review dispute settlement procedures "of whatever kind"; this includes formal procedures.

Yet, notwithstanding the FTC's power to review "*any* dispute settlement procedure," sections 2310(a)(2) and 2310(a)(3) only allow warrantors to create *informal* procedures. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Brown v. Gardner*, 513 U.S. 115, 120 (1994). By allowing the FTC to review "*any* dispute settlement procedure," 15 U.S.C. § 2310(a)(4), but only allowing warrantors to create "*informal* dispute settlement procedures," 15 U.S.C. § 2310(a)(3), Congress prohibited formal procedures.

4. The Eleventh Circuit's opinion renders portions of the MMWA meaningless. Having permitted warrantors to create non-binding procedures only if those procedures comply with FTC rules, did Congress intend to permit warrantors to create similar procedures that are exempt from FTC regulation? The clear answer to this question is no. Any other result would render meaningless the portions of the Act regulating dispute settlement procedures.

No functional difference exists between dispute settlement under the MMWA procedures and arbitration except that arbitration "is *usually* binding on the parties." *Compare* American Arbitration Association, *Supplementary Procedures for the Resolution of Consumer Related Disputes,* Glossary of Terms, "Arbitration" (Mar. 1, 2002), available at http://adr.org., *with* 16 C.F.R. § 703.5 (describing mechanism procedures). That, however, is not a sufficient basis to distinguish arbitration from MMWA procedures.

The FAA does not require that arbitration be binding, *see Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998); *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741 (Ala. 2000), and when Congress passed the MMWA, Pennsylvania and several other states recognized non-binding arbitration. *See* Maurice Rosenberg & Myra Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 Harv. L. Rev. 448 (1961); NICJ, *Staff Studies, supra, at* 72-83 (1973). Federal courts now have a similar program, 28 U.S.C. § 657, and statutes in over half the states recognize some form of non-binding arbitration.

If the MMWA does not apply to arbitration, then any warrantor may obtain the benefits of warranty settlement procedures, but escape FTC regulation, by stating in its warranty, "The dispute settlement procedure created in this document is arbitration; it is not intended to be an informal dispute settlement procedure regulated by the Magnuson Moss Warranty Act." Why would Congress regulate some warranty procedures, but leave others immune from regulation?

Since arbitration is not required to be binding, the Eleventh Circuit has left no circumstance under which a warrantor must comply with the FTC regulations. If a dispute settlement procedure is binding, then the warrantor may argue, "It's not a MMWA procedure; it's *binding arbitration.*" If the dispute settlement procedure is *non*-binding, but violates some other FTC regulation, then the

warrantor may argue, "It's not a MMWA procedure; it's non-binding arbitration."

To believe that Congress intended this result, one must believe that "Congress intended the obligations established by the Act to be open to evasion by subterfuges." *Mourning v. Family Publ'n Serv., Inc.*, 411 U.S. 356, 371 (1972). Surely this is not the result that Congress labored over five years to create.

B. Legislative History: Congress Intended for Warranty Procedures to be Non-binding.

"The Davises argue[d] that Congress considered all methods of dispute resolution, including arbitration, before allowing warrantors to pursue only informal, non-binding settlement procedures." App. at 13-14. The Eleventh Circuit rejected this argument, stating, "[L]egislative history only addresses 'internal [sic] dispute settlement procedures;' it *never* addresses the role of binding arbitration."[1] App. at 13. Again, the Eleventh Circuit is incorrect; it ignored the legislative history.

Senator Magnuson introduced the first version of the MMWA on October 27, 1969, S. 3074, 91st Cong., 115 Cong. Rec. 31483 (1969), and the President signed the Act over five years later on January 4, 1975. Pub. Law No. 93-637, 88 Stat. 2183 (1975). During that period, the National Institute for Consumer Justice (NICJ) conducted a study of "voluntary settlement procedures, including arbitration" at the President's direction. Richard Nixon, Pub. Papers

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[1] The court repeatedly referred to the statutory procedures as "internal dispute settlement procedures." App. at 13, 17. Although this language appears in the conference report, it does not appear in the statute. The conference report reflects, however, that Congress intended to regulate all "internal *or other private dispute settlement procedures,*" which would include external procedures. S. Conf. Rep. No. 93-1408, at 26 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7755, 7758-59; see pages 17-18 *infra*.

209 (1971) (requesting study); National Institute for Consumer Justice, *Redress of Consumer Grievances* (1973) [hereinafter NICJ, *Redress of Grievances*] (presenting results of study).

During debates on the MMWA, Senator Dole argued that Congress had "insufficient data on the nature and frequency of consumer disputes and on the effectiveness of existing procedures such as small claims courts, class actions, and private dispute settlement techniques, *including arbitration* in resolving grievances." 117 Cong. Rec. 39626 (1971). On November 8, 1971, the Senate passed a version of the Act that authorized a study "of existing and potential and voluntary *settlement procedures, including arbitration.*" 117 Cong. Rec. 39876, 39880 (1971) (passing Senate Bill 986). The bill thus defined arbitration as a type of dispute settlement procedure.

Public hearings on the MMWA spanned three sessions of Congress. *See Adequacy of Consumer Redress Mechanisms: Joint Hearing Before the Subcomm. on Consumers of the Senate Comm. on Commerce and the Subcomm. on the Representation of Citizens' Interests of the Senate Comm. on the Judiciary*, 93d Cong. (1973) [hereinafter *Redress Hearings*]; *Consumer Warranty Protection – 1973: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong. (1973) [hereinafter *1973 House Hearings*]; *Consumer Warranty Protection: Hearings on H.R. 6313, H.R. 6314, H.R. 261, H.R 4809, H.R. 5307, H.R. 10673 (and Similar and Identical Bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong. (1971) [hereinafter *1971 House Hearings*]; *Warranties and Guaranties: Hearings Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 91st Cong. (1970) [hereinafter *1970 House Hearings*]; *Consumer Products Warranties and Improvement Act of 1971: Hearings on S. 986 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong. (1971) [hereinafter *1971 Senate Hearings*]; *Consumer Product Warranty Act: Hearings on S. 3074*

Before the Consumer Subcomm. of the Senate Comm. on Commerce, 91st Cong. (1970) [hereinafter *1970 Senate Hearings*].

Although the original version of the MMWA encouraged warrantors to establish informal dispute settlement procedures, it did not authorize the FTC to regulate the procedures, and it did not require consumers to exhaust them before filing suit. S. 3074, 91st Cong. § 16, 115 Cong. Rec. 31483, 31485 (1969). Witnesses agreed that arbitration was an informal dispute settlement procedure, but they disagreed about whether the FTC should regulate it.

The Chairman of the Federal Trade Commission argued, "Since an arbitration remedy can be formulated and administered in a variety of ways, we recommend that the administering agency be authorized to lay down the standards to which *this arbitration remedy* must conform." *1970 House Hearings*, *supra*, at 64 (statement of Miles W. Kirkpatrick, Chairman of the FTC). Industry representatives disagreed, arguing, "To require governmental supervision of our effort, and the efforts of all independent organizations that undertake to provide procedures for *arbitrating* consumer claims would delay and inhibit their work." *See 1970 Senate Hearings*, *supra*, at 153 (statement of George P. Lamb, General Counsel, Associations of Home Appliance Manufacturers). Congress accepted the FTC's recommendation. As passed, the Act authorizes the FTC to regulate dispute settlement procedures. 15 U.S.C. § 2310(a)(2) & 2310(a)(4).

Witnesses likewise differed about whether the arbitration remedy should be binding. FTC Chairman Kirkpatrick recommended that "a provision be included *requiring* warrantors, in the event of a warranty dispute, to submit to *binding arbitration.*"[2] *1970 House Hearings*,

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[2] After President Nixon requested the study of "voluntary settlement procedures, including arbitration" on February 24, 1971, Richard Nixon, Pub. Papers 209 (1971), administration officials declined to offer any further opinions about the proper form for the procedures, citing

(Continued on following page)

supra, at 64. In the 1973 House Hearings Mr. Lemov questioned Professor Leary about the possibility that the Act would permit warrantors to require binding arbitration:

> MR. LEMOV. Assuming this section was the law and a consumer resorted to such [informal dispute settlement] procedure and the decision was rendered by the *arbitration panel*, would you say there would be court review of that proceeding?
>
> MR. LEARY. I would think it would depend entirely on how the procedure was set up as to whether you are going to bring into operation *all the arbitration statutes which limit court review of arbitrators' awards.*
>
> MR. LEMOV. Is it possible that might be construed as eliminating court review of the decision?
>
> MR. LEARY. I think it would depend on how the procedure is set up, how it is set up by the industry and *I think they would write it so it would be final, binding and conclusive and bar all the courts.*

1973 House Hearings, *supra*, at 120-21.

The House Report clearly stated that it intended to preclude this possibility: "An adverse decision in *any* informal dispute settlement proceeding *would not be a bar to a civil action on the warranty involved in the proceeding.*" H.R. Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723; *see also* S. Rep. No. 93-151 at 23 (1973) ("Any purchaser who utilizes an informal dispute settlement mechanism would not be prevented from seeking formal judicial relief following such utilization.").

The minority views in the House Report, however, criticized the majority report for failing to give sufficient consideration to *binding arbitration*, stating, "These matters [typical consumer complaints] can be more

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the pending study. *See 1971 Senate Hearings, supra*, at 218-19; *1971 House Hearings, supra*, at 250; *1973 House Hearings, supra*, at 73-74.

promptly and effectively resolved through such techniques as more efficient small claims courts, neighborhood courts, *binding consumer arbitration*, voluntary settlement mechanisms, and improved enforcement agencies." H.R. Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7749.

The NICJ released its report in November 1973, and representatives of the Institute, including present Supreme Court Justice Antonin Scalia, appeared before Congress. *See Redress Hearings, supra*. The report recommended "that in some circumstances persons be permitted to resort to arbitration only after they have exhausted reasonable *internal* grievance procedures." NICJ, *Redress of Grievances, supra,* at 10; *see also* 120 Cong. Rec. 55 (1974) (summarizing NICJ recommendations).

Senators questioned Judge Braucher of the Massachusetts Supreme Court, the chairman of the NICJ Board, *not* about whether consumers should exhaust internal procedures before pursuing arbitration, but about whether they should exhaust *arbitration before filing suit*:

> SENATOR MOSS. Do you think that *arbitration* might be better used in conjunction with some other mechanism, such as a small claims court? Do you think that we can have *a more formal dispute mechanism* to be used with it?
>
> JUDGE BRAUCHER. This is a matter we discussed at considerable length, and there are models in the field, as the chairman knows. We referred to the report of the Philadelphia program, I think, and the Harlem, New York City Program, where arbitration right at the courthouse with lawyers taking the load from the court cases, and that has worked and worked pretty well.
>
> * * *
>
> SENATOR MOSS. That is something I was puzzling about, whether it [arbitration] needed to be combined with *a more formal procedure*, in order to persuade the parties, so to speak, to get down to arbitration,

without losing the value of voluntary give-and-take that settles the matter.

Redress Hearings, supra, at 10-11.

The Philadelphia and New York programs were *non*-binding arbitration programs. *See* NICJ, *Staff Studies, supra*, at 73, 78; *see* Maurice Rosenberg & Myra Schubin, *Trial by Lawyer: Compulsory Arbitration of Small Claims in Pennsylvania*, 74 Harv. L. Rev. 448 (1961) (reporting on effectiveness of programs). These comments reflect Senator Moss' consideration of informal, non-binding arbitration, after which the consumer could resort to a "more formal procedure," court. These comments also reflect Congress' judgment that the possibility of court action was necessary to encourage warrantors "to develop workable informal dispute settlement procedures." S. Rep. No. 93-151, at 8 (1973).

Senator Tunney questioned Judge Braucher further:

SENATOR TUNNEY. The Institute has recommended business redress proposals. One proposal is to require the consumer to first use whatever business-sponsored mechanism exists prior to allowing a small claims court action. Do you feel such a proposal is fair?

JUDGE BRAUCHER. The recommendation that you are referring to on that, well, at least the one I recall, has to do with the possibility of exhausting internal grievance procedures before you go to arbitration.

That is on page 10, recommendation No. 8. Now, I don't remember having a similar thing about small claims, and I would be a little more dubious about it here.

Redress Hearings, supra, at 17.

Congress did not fully accept the NICJ recommendations. Rather than requiring consumers to exhaust *internal* procedures before pursing *binding* arbitration, as the NICJ had recommended, the MMWA requires consumers to exhaust *informal* dispute settlement procedures before filing suit. 15 U.S.C. § 2310(a)(3). This remedy was similar to the Philadelphia and New York non-binding arbitration

programs that had "worked and worked pretty well." *Redress Hearings*, *supra*, at 10.

The Senate Commerce Committee Report on the Consumer Controversies Resolution Act specifically describes the MMWA as doing this:

> Several existing experiments, which utilize procedures such as arbitration prior to adjudication in order to dispose of controversies more quickly, have been brought to the Committee's attention. Obviously, the most efficient resolution of many disputes is to encourage the parties to resolve them. This principle was recognized by the Committee in section 110(a) [15 U.S.C. § 2310] of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, which encourages the development of informal dispute settlement mechanisms by warrantors.

S. Rep. No. 95-210, at 7 (1977).

By 1978 representatives of the American Arbitration Association were complaining about the non-binding arbitration procedure that the MMWA had established. Testifying about the proposed Consumer Controversies Resolution Act, its Associate General Counsel stated, "There are certain provisions under the Magnuson-Moss Warranty Act which have proven extremely difficult to work with: (1) The mechanism for resolving disputes must be nonbinding." *Consumer Controversies Resolution Act: Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Comm.*, 95th Cong. 137 (1978). She then thanked Congress for not including a similar prohibition in the Consumer Controversies Act, stating, "This stumbling block has been eliminated from the new bills." *Id.*

In 1980 Congress passed the Dispute Resolution Act. Pub. Law No. 96-190, 94 Stat. 17. This Act defined the term *dispute resolution mechanism* as "a forum which provides for arbitration, mediation, conciliation, or a similar procedure, which is available to resolve a minor dispute." *Id.* at § 3(4), 94 Stat. at 18. The House Report on this Act used the MMWA term, *dispute settlement*

mechanism, as synonymous with the term *dispute resolution mechanism* used in the Dispute Resolution Act. H.R. Rep. 96-492, pt. 1, at 17 (1979) ("We expect that any effective *dispute settlement mechanism* should not only resolve individual disputes. . . . "), *reprinted in* 1980 U.S.C.C.A.N. 3, 8.

The statutory definition in the Dispute Settlement Act confirms that Congress used the term *informal dispute settlement procedure* as a generic term for all non-judicial dispute resolution procedures, including arbitration. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (subsequent acts may focus statute's meaning). States have defined the term *informal dispute settlement* procedure as arbitration.[3]

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[3] *See, e.g.*, Fla. Stat. Ann. § 681.102(17) (2002) (" 'Procedure' means an informal dispute-settlement procedure established by a manufacturer to mediate and arbitrate motor vehicle warranty disputes."); Ga. Code Ann. § 10-1-782(8) (2002) (" 'Informal dispute resolution settlement mechanism' means any procedure established, employed, utilized, or run by a manufacturer for the purpose of resolving disputes with consumers regarding any warranty."); Idaho Code § 48-906(2) (2002) ("An informal dispute settlement mechanism provided by this chapter shall, at the time a request for arbitration is made, provide to the consumer and to each person who will arbitrate the consumer's dispute, information. . . ."); Ky. Rev. Stat. Ann. § 367.865 (2000) (refers to decision maker in informal dispute resolution procedure as arbitrator); Me. Rev. Stat. Ann. tit. 10, § 1161(5) (2001) (" 'State-certified arbitration' means the informal dispute settlement procedure administered by the Department of the Attorney General which arbitrates consumer complaints. . . ."); Minn. Stat. § 325F.665(1)(f) (2001) (" 'Informal dispute settlement mechanism' means an arbitration process or procedure by which the manufacturer attempts to resolve disputes with consumers. . . ."); N.J. Rev. Stat. § 56-12-30 (2000) (" 'Manufacturer's informal dispute settlement procedure' means an arbitration process or procedure by which the manufacturer attempts to resolve disputes with consumers regarding motor vehicle nonconformities and repairs. . . . "); N.H. Rev. Stat. § 357-D:4(IV) (2002) ("Arbitration of the consumer's complaint, either through the manufacturer's dispute settlement mechanism or the board, shall be held within 40 days. . . . "); N.Y. Gen. Bus. Law § 198-a(m) (2002) (refers to decision makers in informal dispute settlement mechanism as "arbitrators").

The Conference Report on the final version of the MMWA shows that Congress intended for the FTC and courts to regulate arbitration under the Act:

> It should be recognized, however, that provision for governmental or consumer participation in *internal or other private dispute settlement procedures* under the bill is required by the legislation. . . . The conference substitute provides that the Federal Trade Commission shall establish rules for *dispute settlement procedures* which operate under the legislation, and may disapprove noncomplying procedures. Commission rules must provide for participation in such procedures by independent or governmental entities. An independent entity is one which is not under the control of any party to the dispute. A governmental entity would include a state or local agency or a small claims court.[4] . . . [T]he conferees recognize the limited resources of the Commission and the fact that its other responsibilities may preclude it from acting in some cases where *private dispute settlement proceedings* may not comply with the legislation or the Commission's rules thereunder. Accordingly, the courts would be free to determine that a given *dispute settlement procedure* need not be exhausted because it was not fair, had no provision for governmental or consumer participation, or did not comply with FTC rules.

S. Conf. Rep. No. 93-1408, at 26 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7755, 7758-59.

Congress had considered two types of private procedures: internal procedures and arbitration. In his remarks at the hearings on Redress Mechanisms, present Supreme Court Justice Antonin Scalia had used the term "private mechanism" to refer to both of these devices, stating,

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[4] The reference to court participation in the settlement procedures may be understood as a reference to the type of non-binding arbitration programs about which Judge Braucher was questioned during the Redress Hearings and to which the Senate Report on the Consumer Controversies Resolution Act referred. *See pages* 13-14 *supra*.

"[T]he portions of the report that deal with *private mechanisms* – the first two sections concerning internal mechanisms and arbitration – are the portions that are perhaps the most difficult to implement." *Redress Hearings*, *supra*, at 9 (remarks of Honorable Antonin Scalia). Justice Scalia distinguished these "private mechanisms" from "court mechanisms and other governmental mechanisms." *Id.* at 10.

Arbitration is a private dispute settlement procedure, and the conference report reflects that Congress intended for the FTC and courts to regulate it. *See Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants*, 489 U.S. 426, 441 (1988) ("private dispute resolution procedures"); *Buffalo Forge Co. v. United Steelworkers of Am.*, 428 U.S. 397, 407 (1976) ("private dispute settlement mechanisms"); 117 Cong. Rec. 39626 (1971) ("private dispute settlement techniques") (statement of Senator Dole); Merton C. Bernstein, *Private Dispute Settlement: Cases and Materials on Arbitration* (1968) (book title).

The Eleventh Circuit concluded that "legislative history . . . *never* addresses the role of binding arbitration." App. at 13. Contrary to that holding, Congress considered three specific recommendations for binding arbitration: one from the FTC commissioner, one from the minority House Report, and one from the National Institute for Consumer Justice. Congress rejected these proposals and permitted warrantors to create only informal, non-binding procedures, all subject to FTC regulation.

II. THE ELEVENTH CIRCUIT ERRED BY INVOKING THE FEDERAL POLICY IN FAVOR OF ARBITRATION AS BASIS FOR DISREGARDING THE FTC'S INTERPRETATION OF THE MMWA

Summary. The validity of agency regulations is determined by the test articulated in *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984): first, "whether Congress has directly spoken to the

precise question at issue;" and second, "if the statute is silent or ambiguous with respect to the specific issue, . . . whether the agency's answer is based on a permissible construction of the statute."

Although the Eleventh Circuit determined that neither the MMWA nor its history addresses binding arbitration, App. at 19, the court did not determine whether "the agency's answer is based on a permissible construction" of *the MMWA* as required by *Chevron*. 467 U.S. at 842-43. Rather, it invoked the "strong federal policy toward arbitration" as a basis for invalidating the regulations. App. at 23. This was contrary to *Chevron* and its progeny.

A. The FTC Regulations.

Section 2310(a)(4) authorizes the FTC to "review the bona fide operation of *any* dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy," and section 2310(a)(2) directs it to "prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty." Section 2309 required the FTC to provide notice of proposed rulemaking, to receive oral and written "presentations of data, views, and arguments," and to keep a record of its proceedings. It also authorized judicial review of regulations adopted. 15 U.S.C. § 2309.

Congress intended for the MMWA regulations to carry the force of law. Section 2310(b) of title fifteen states, "It shall be a violation of section 5(a)(1) of the Federal Trade Commission Act for any person to fail to comply with any requirement imposed on any person by this title (*or any rule thereunder*)."

In adopting regulations under the MMWA, the FTC rejected industry arguments for binding arbitration. It noted, "Several industry representatives contended that warrantors should be allowed to require consumers to resort to mechanisms whose decisions would be legally binding (*e.g., binding arbitration*). The Rule does not allow

this." 40 Fed. Reg. 60168, 60210 (1975). "[R]eference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act." *Id.* at 60211.

The FTC gave two reasons for rejecting binding arbitration. "First, as the Staff Report indicates, Congressional intent was that Section 110 Mechanisms not be legally binding." *Id.* at 60210. Second, the FTC was "not now convinced that any guidelines which it set out [for binding arbitration] could ensure sufficient protection for consumers." *Id.*

Under legislative regulations adopted in 1975, "[d]ecisions of the Mechanism *shall not be legally binding* on any person," 16 C.F.R. § 703.5(j), and the mechanism is required to inform the consumer that "legal remedies, including the use of small claims court, may be pursued." 16 C.F.R. § 703.5(g). Under interpretative regulations adopted in 1977, "A warrantor shall not indicate in any written warranty . . . that the decision of the warrantor, service contractor, or any designated third party is final or binding . . . . Nor shall a warrantor state that it alone shall determine what is a defect . . . . Such statements are deceptive." 42 Fed. Reg. 36112, 36116 (1977) (codified at 16 C.F.R. § 700.8).

On April 22, 1999, the FTC completed a review of its legislative regulations, and it again rejected industry arguments for binding arbitration. 64 Fed. Reg. 19700, 19708-09 (1999). It also approved *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala.), *aff'd*, 127 F.3d 40 (11th Cir. 1997), noting, "At least one federal district court has upheld the Commission's position that the Warranty Act does not intend for warrantors to include binding arbitration clauses in written warranties on consumer products." *Id.* at 19709 n.72 (1999).

B. The Legal Standard.

"Valid regulations establish legal norms," *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999), and are entitled to "legislative effect." *Atkins v. Rivera*, 477 U.S.

154, 162 (1986). The test for determining whether an agency interpretation carries the force of law is whether "Congress delegated authority to the agency generally to make rules carrying the force of law, and [whether] the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). "[A]ny ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 227; *see also Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984). This level of deference is known as "*Chevron* deference."

Under this standard, "[i]f the agency's interpretation is not in conflict with the plain language of the statute, deference is due." *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992). "[L]egislative history which does not demonstrate a clear and certain congressional intent cannot form the basis for enjoining regulations." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991).

Other agency interpretations – those not adopted in the exercise of an agency's statutory authority to make law – are entitled to respect, "but only to the extent that those interpretations have the power to persuade." *National R.R. Passenger Corp. v. Morgan*, 122 S. Ct. 2061, 2071 n.6 (2002); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Agency "interpretative guidelines" are entitled to this type of deference, which is known as *Skidmore* deference. *See id.; Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

C. The Eleventh Circuit's Analysis.

1. The Eleventh Circuit erred by invoking the federal policy in favor of arbitration as a basis for refusing to enforce FTC regulations. The Eleventh Circuit "conclude[d] that Congress failed to directly address binding arbitration anywhere in the text of or legislative history of the MMWA." App. at 19. Notwithstanding this, the court refused to defer to the FTC's interpretation of the Act.

The basis for the court's refusal to defer was "the strong federal policy toward arbitration." App. at 23. This,

however, is not a sufficient basis for stripping the FTC of its statutory powers under the MMWA. As this court recently stated, "[T]he proarbitration policy goals of the FAA do not require [an] agency to relinquish its statutory authority." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

A federal agency, such as the FTC, may issue regulations and determinations that limit the application of other federal laws. *See United States v. Alaska*, 503 U.S. 569 (1992) (Corps of Engineers regulations, under Rivers and Harbors Appropriation Act, could alter Alaska's seaward boundary under Submerged Lands Act); *Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991) (ICC, acting under Interstate Commerce Act, could abrogate collective bargaining agreement enforceable under Railway Labor Act).

"[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). The FAA does not preclude otherwise valid agency action; a court may nullify an arbitration provision "upon such grounds as exist at law or equity for the revocation of any contract." 9 U.S.C. § 2. An agency regulation or determination is a recognized ground for refusing to enforce a contract. *See, e.g., Norfolk & Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991).

2. The Eleventh Circuit erred by holding that section 700.8 contains the reason that the FTC rejected binding arbitration. The court determined that section 700.8 is a *legislative* regulation, that it contains the reason that the FTC rejected binding arbitration, and that "the motive behind the *legislative regulation* is contradictory to Supreme Court rationale." App. at 21; *see also* App. at 20 ("In its legislative regulations, the FTC reasoned that a decision regarding the warranty dispute may not be binding because 'section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contracts.'"). The court was incorrect.

First, section 700.8 is not a legislative regulation; it is an interpretation. The order adopting section 700.8 stated that the interpretations "are not . . . substantive rules, and do not have the force or effect of statutory provisions." 42 Fed. Reg. 36112 (1977). Second, no evidence establishes that section 700.8 contains the reason that the FTC rejected binding arbitration. Section 700.8 does not mention arbitration, and the FTC proposed it on August 16, 1976, *see* 41 Fed. Reg. 34654, 34656 (1976), over seven months *after* it had rejected binding arbitration. *See* 40 Fed. Reg. 60168, 60210 (1975). Finally, the FTC did not mention section 700.8 in 1999 when it reviewed its rules against binding arbitration. *See* 64 Fed. Reg. 19700, 19708-09 (1999).

Considering legislative history, section 700.8 was probably drafted to prohibit a warranty practice known as "the opinion of the seller governs." 120 Cong. Rec. 31317, 31320 (1974). "This clause typically reads, 'The manufacturer will be the sole judge of whether the part is defective.'" *Id.* This practice is deceptive, as the FTC determined, because "section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contracts." 16 C.F.R. § 700.8.

3. The Eleventh Circuit erred by refusing to defer to the FTC's definition of "dispute settlement procedure." The court acknowledged that "any informal dispute procedure must be non-binding," App. at 14, and that "[i]n its *interpretative regulations*, the FTC has defined 'mechanism' broadly to include all non-judicial resolution procedures, including arbitration. *See* 40 Fed. Reg. 60167, 60210 (1975)." App. at 17-18.

First, the language cited is not an *interpretative* regulation; it is the FTC's explanation for the *legislative* regulation contained in section 703.5(j). This definition is entitled to deference. *Hillsborough County v. Automated Med. Labs, Inc.*, 471 U.S. 707, 714-16 (1985) (deferring to explanatory statement made in adopting regulations); *National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407, 420 (1992) ("[T]he fact that the ICC did not

in so many words articulate its interpretation of the word 'required' does not mean that we may not defer to that interpretation.").

Second, the definition of statutory terms is a classic agency function. *See, e.g., Nationsbank of N.C. v. Variable Annuity Life Ins.*, 513 U.S. 251, 257 (1995). ("If the administrator's reading fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design, we give the administrator's judgment 'controlling weight.'"); *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735 (1996) (deferring to definition of "interest"); *National R.R. Passenger Corp. v. Boston & Marine Corp.*, 503 U.S. 407 (1992) (deferring to definition of "required"); *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) (deferring to definition of "stationary source"); *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978) (deferring to definition of "bounty").

Chevron recognizes that an agency may formulate policy and "speak with the force of law" on issues about which Congress had no specific intent. *See United States v. Mead Corp.*, 533 U.S. 218, 229 (2001). The court in *Chevron* stated, "[W]e agree with the Court of Appeals that Congress did not have a specific intention on the applicability of the bubble concept in these cases, and conclude that the EPA's use of that concept here is a reasonable policy choice for the agency to make." 467 U.S. at 845; *see Chevron, U.S.A., Inc. v. Echazabal*, 122 S. Ct. 2045 (2002) (deferring to EEOC regulation establishing new ADA defense).

Congress specifically intended for the FTC to determine what warranty procedures were subject to regulation and the limits of that regulation. 15 U.S.C. §§ 2310(a)(2), 2310(a)(4); *cf. Yellow Transport., Inc. v. Michigan*, 123 S. Ct. 371, 378 (2002) ("It was precisely Congress' command, . . . that the ICC promulgate standards to govern the Single State Registration System."). If the FTC had not defined *mechanism* broadly, then any warrantor could easily evade FTC requirements – including its rules on

disclosure, impartiality, and fairness – by creating unregulated procedures. *Cf. Mourning v. Family Publ'n Serv., Inc.*, 411 U.S. 356, 371 (1972) ("To hold that Congress did not intend the [FTC] to take action against this type of manipulation would require us to believe that . . . Congress intended the obligations established by the Act to be open to evasion by subterfuges.").

Since Southern contended that the FTC regulations were invalid, it bore the burden not merely of refuting that arbitration is a type of dispute settlement procedure, but also of proving that the FTC's interpretation is unreasonable. *See National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002) ("Respondents' burden, then, is not merely to refute the proposition that 'any attachment' means 'any attachment'; they must also prove the FCC's interpretation is unreasonable.").

The FTC's definition of *dispute settlement procedure* to include arbitration is consistent with dictionaries of arbitration terms, ordinary English usage, and legislative history. *See* pages 4-5, 9-18 *supra*. As a matter of law, the FTC's adoption of a standard dictionary definition of *dispute settlement procedure* is reasonable and controlling. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992).

4. The Eleventh Circuit erred by refusing to defer to the FTC's construction of the statutory language. The first reason given by the FTC for rejecting binding arbitration was "as the Staff Report indicates, Congressional intent was that Section 110 Mechanisms not be legally binding." 40 Fed. Reg. 60168, 60210 (1975). If the Staff Report was a "subcommittee staff report,"[5] App. at

[5] The FTC order adopting the MMWA regulations refers to two staff reports. The report of its own staff, the FTC Staff Report, and the staff report of the House Subcommittee on Commerce and Finance. The FTC refers to the subcommittee staff report as "House Subcomm. Staff Report." 40 Fed. Reg. 60168, 60169, n.9 (1975). This report appears at 120 Cong. Rec. 31317 (1974).

21, then presumptively it would support the FTC's interpretation of the statute. *See Ruckelshaus v. EPA*, 463 U.S. 680, 689 n.10 (1983) (relying on staff report); *Heckler v. Campbell*, 461 U.S. 458, 466 n.10 (1983) (relying on staff report).

Yet, although the Staff Report "appears to no longer be attainable," App. at 21, the court nevertheless dismissed the FTC's reliance on it as unreasonable. This was an improper assignment of the burden of proof. As the party challenging the FTC's interpretation, Southern was required to prove that the FTC interpretation was unreasonable. *See National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 333 (2002). Without examining the Staff Report, the court had no factual or legal basis for its conclusion that the FTC's reliance on it was unreasonable.

Moreover, the court never discussed the remainder of the FTC's first and primary rationale; namely, that "Congressional intent was that Section 110 Mechanisms not be legally binding." 40 Fed. Reg. 60210 (1975). In 1999 the FTC again stated that binding arbitration was "contrary to the Congressional intent" "based on the plain language of the Warranty Act." 64 Fed. Reg. 19700, 19708-09 (1999). "A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." *Batterton v. Francis*, 432 U.S. 416, 425 (1977). Having determined that Congressional intent was unclear, the court was required to defer to the FTC's construction of the statute.

5. The Eleventh Circuit erred by substituting its judgment for that of the FTC about the fairness of consumer arbitration. The second reason given by the FTC for rejecting binding arbitration was "even if binding Mechanisms were contemplated," it was "not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." 40 Fed. Reg. 60210 (1975). The court rejected this rationale, concluding, that, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220

(1987), this court had "declin[ed] to defer to the SEC's interpretation of the Securities Exchange Act of 1934 based on" a similar rationale. App. at 21.

First, this was a secondary basis for the FTC's rejection of binding arbitration; this reasoning is important only if the primary basis for the FTC's decision – its interpretation of Congressional intent – is unreasonable. Second, the court's explanation of the holding in *McMahon* is incorrect. In *McMahon* "the SEC ha[d] *specifically approved* the arbitration procedures of the New York Stock Exchange, the American Stock Exchange, and the NASD." 482 U.S. at 234. Although an *old* SEC regulation prohibited arbitration agreements, the SEC's *position* was that the regulation *should not* be enforced. 482 U.S. at 234 n.3 & 243. The court did not "declin[e] to defer" to the regulation; under *Chevron* no deference is due to abandoned agency views, such as the SEC's abandoned opposition to arbitration agreements. *See Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992).

Moreover, Congress recently accepted many of the arguments that consumers have long made about the unfairness of mandatory arbitration provisions, S. Rep. No. 107-266, at 5-8 (2002) (describing unfairness of mandatory arbitration clauses), and provided that such provisions are unenforceable in motor vehicle franchise contracts. Pub. L. No. 107-273, § 11028(a)(2), 116 Stat. 1758 (2002). "The same arguments which support the argument against enforcement of these provisions in business-to-business contracts apply more strongly to consumer contracts." *Fairness and Voluntary Arbitration Act: Hearings on H.R. 534 Before the Subcomm. on Commercial and Administrative Law of the House Comm. of the Judiciary*, 106th Cong. 157 (2000) (statement of Joan Claybrook, President of Public Citizens Congress Watch).

Even the American Arbitration Association's general counsel admitted reservations about the fairness of predispute arbitration clauses in consumer contracts:

> The Advisory Committee, which prepared the *Consumer Due Process Protocol*, was divided on the

> question of whether pre-dispute agreements to arbitrate were suitable for transactions between individuals and businesses, under any circumstances. Some commentators feel strongly that such agreements are not appropriate, on the basis of such concerns as the reasonable expectations of consumers and relative bargaining power.

Id. at 114 (statement of Florence Peterson); *see* National Consumer Disputes Advocacy Committee, American Arbitration Association, *Consumer Due Process Protocol* Introduction: Genesis of Advisory Committee (1998) (recognizing "legitimate concerns regarding the fairness of consumer conflict resolution mechanisms . . . particularly . . . binding arbitration."), available at http://adr.org.

"[A] reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *see also Chevron*, 467 U.S. at 866 ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's *policy*, . . . the challenge must fail."). As a matter of law, the FTC did not act unreasonably in adopting a rationale similar to that recently accepted by Congress.

III. THIS COURT SHOULD DECIDE THE IMPORTANT QUESTIONS OF WHETHER THE MMWA PROHIBITS WARRANTY PROVISIONS REQUIRING BINDING ARBITRATION AND WHETHER THE FEDERAL POLICY FAVORING ARBITRATION IS A SUFFICIENT BASIS FOR DISREGARDING THE FTC'S INTERPRETATION OF THE MMWA.

Wilson v. Waverlee Homes, Inc., 954 F. Supp. 1530 (M.D. Ala. 1997), *aff'd*, 127 F.3d 40 (11th Cir. 1997), held that the MMWA prohibits binding arbitration of consumer warranty disputes; it was the first case to address the issue. The Eleventh Circuit affirmed *Waverlee* without

opinion, and the FTC approved the decision. *See* 64 Fed. Reg. 19700, 19709 n.72 (1999).

Federal district courts followed *Waverlee*. *See Browne v. Kline Tysons Imports, Inc.*, 190 F. Supp. 2d 827 (E.D. Va. 2002); *Yeomans v. Homes of Legend, Inc.*, 2001 U.S. Dist. LEXIS 2528 (M.D. Ala. 2001); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958, 962-65 (W.D. Va. 2000); *Raesly v. Grand Hous., Inc.*, 105 F. Supp. 2d 562, 573 (S.D. Miss. 2000); *Wood v. Cooper Chevrolet, Inc.*, 102 F. Supp. 2d 1345, 1349 (N.D. Ala. 2000); *Andrews v. Grand Manor, Inc.*, 1999 U.S. Dist. LEXIS 15429 (S.D. Ala. July 13, 1999), *adopted*, 1999 U.S. Dist. LEXIS 15464 (S.D. Ala. Sept. 13, 1999); *Rhodes v. E & T Investments, Inc.*, 6 F. Supp. 2d 1322 (M.D. Ala. 1998); *Boyd v. Homes of Legend, Inc.*, 981 F. Supp. 1423 (M.D. Ala. 1997), *rev'd on other grounds*, 188 F.3d 1294 (11th Cir. 1999), as did some state courts. *See Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002). *Compare Southern Energy Homes, Inc. v. Lee*, 732 So. 2d 994 (Ala. 1999) (following *Waverlee*), *with Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000) (overruling *Lee*).

In holding that the MMWA allows warrantors to impose binding arbitration on consumers, the Eleventh Circuit characterized the issue as an "important question," App. at 1, about which "state and federal courts are sharply divided." App. at 5. This issue affects the legal rights of every citizen in the nation. Consumers have no more power today than in 1975 to negotiate sales terms. If suppliers require a waiver of judicial access as a condition of selling human necessities, as is the case in Alabama, S. Rep. No. 107-266, at n.5 (2002) ("Mandatory binding arbitration clauses are not prevalent in most dealer-consumer new car contracts *except in Alabama*."), then consumers have no alternative but to surrender their rights to judicial access.

By holding that arbitration is not a dispute settlement procedure, the Eleventh Circuit disregarded the FTC's long-standing interpretation of the MMWA, 16 C.F.R. § 703.5(j); 40 Fed. Reg. 60168, 60210 (1975), and it

stripped the FTC of its statutory power to regulate consumer warranties. Any supplier may evade FTC regulation by labeling its dispute settlement procedure "arbitration." This nullifies the statutory scheme that permits warranty settlement procedures *only if* those procedures comply with FTC regulations, 15 U.S.C. § 2310, and it is contrary to *Chevron, U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

These important issues have not been, but should be, settled by this court. *See* Sup. Ct. R. 10(c). Moreover, the Eleventh Circuit's decision is in conflict with the decision of the Mississippi Supreme Court in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), a state court of last resort. *See* Sup. Ct. R. 10(a).

Although Congress enacted the MMWA over twenty-eight years ago, and although it is the only national consumer warranty law, this court has never decided any case under it.

CONCLUSION

For the reasons stated above, the Court should grant the Petition for a Writ of Certiorari, resolve the important issues raised, and reverse the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

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Michael Shane DAVIS, Heather N. Davis,
Plaintiffs-Appellees,

v.

SOUTHERN ENERGY HOMES, INC.,
a corporation, Defendant-Appellant,

Bilo Homes, Inc. a corporation,
David L. Smitherman, Defendants.

No. 01-13831.

United States Court of Appeals, Eleventh Circuit

Sept. 19, 2002.

W. Scott Simpson, Birmingham, AL, James C. Pennington, Amy Elizabeth Glenos, Ogletree, Deakins, Nash Smoak & Stewart, P.C., Birmingham, AL, for Defendant-Appellant.

G. Houston Howard, II, Howard, Dunn, Howard & Howard, Wetumpka, AL, for Plaintiffs-Appellees.

Appeal from the United States District Court for the Middle District of Alabama.

Before ANDERSON and DUBINA, Circuit Judges, and MILLS*, District Judge.

DUBINA, Circuit Judge:

The important question presented in this appeal is whether the Magnuson-Moss Warranty Act permits or prohibits the enforcement of pre-dispute binding arbitration

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

clauses within written warranties. We hold that the Magnuson-Moss Warranty Act permits binding arbitration and that a written warranty claim arising under the Magnuson-Moss Warranty Act may be subject to a valid pre-dispute binding arbitration agreement.

I. BACKGROUND

In October 1999, Michael Shane Davis and Heather N. Davis ("the Davises") purchased a manufactured home constructed by Southern Energy Homes, Inc. ("Southern"). When the Davises purchased the home, they signed a binding arbitration agreement contained within the manufactured home's written warranty. The Davises later discovered multiple defects in the home and notified Southern of the problems. After Southern failed to correct the defects to the Davises' satisfaction, the Davises filed suit in the Circuit Court of Lowndes County, Alabama, asserting claims for breach of express and implied warranties, violations of the Magnuson-Moss Warranty-Trade Commission Act ("MMWA" or "the Act"), negligent and wanton repair, and fraud. Southern removed the case to federal court and, in lieu of an answer, filed a Motion to Dismiss or, in the Alternative, to Compel Arbitration. The district court, relying on its prior decision in *Yeomans v. Homes of Legend, Inc.*, 2001 WL 237313, No. 00-D-824-N (M.D.Ala. March 5, 2001), which found that the MMWA prohibits binding arbitration, denied Southern's motion. Southern timely appealed the district court's order denying Southern's Motion to Compel Arbitration.

II. ISSUES

(1) Whether Southern waived its right to appeal the district court's order denying its Motion to Compel Arbitration when Southern conceded that the district court was bound by its prior decision in *Yeomans*.

(2) Whether the Magnuson-Moss Warranty Act permits or precludes enforcement of binding arbitration agreements with respect to written warranty claims.

III. STANDARD OF REVIEW

We review a district court's order denying a motion to compel arbitration *de novo*. *Cunningham v. Fleetwood Homes of Ga., Inc.*, 253 F.3d 611, 614 (11th Cir. 2001) (citing *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998)).

IV. DISCUSSION

A. *Waiver of Right to Appeal*

The Davises contend that Southern waived its right to appeal by acknowledging to the district court that the court was bound by its prior holding in *Yeomans*. We disagree that Southern waived its right to appeal. Southern argued in its initial motion and brief to the district court that *Yeomans* and the cases *Yeomans* relies upon are incorrect. Southern, therefore, maintained its position and did not waive its right to appeal. Thus, we must consider the merits of this appeal.

B. *The MMWA and Binding Arbitration of Written Warranty Claims*

In this appeal, Southern argues that, based upon the strong federal policy of enforcing valid arbitration agreements under the Federal Arbitration Act ("FAA"), the Davises must submit their written warranty claims to binding arbitration rather than file suit for breach of warranty. To support this argument, Southern notes that the Supreme Court continually enforces binding arbitration agreements of statutory claims and argues that the MMWA is similar to these other statutes because nothing in the MMWA's text, legislative history, or underlying purposes evinces that Congress intended to preclude binding arbitration of written warranty claims. Southern also asserts that the Federal Trade Commission's ("FTC") regulations and interpretations, which prohibit binding arbitration of MMWA claims, are unreasonable, and thus, we should accord them no deference.

The Davises, conversely, assert that arbitration is an improper forum for MMWA claims and that the Act's language, legislative history, and underlying purposes compel a conclusion that dispute settlement procedures cannot be binding under the MMWA. The Davises argue that § 2310(a) of the MMWA, which states that consumers must resort to a warrantor's informal dispute settlement mechanism *before* commencing a civil action, necessarily implies that the decision of any informal settlement procedure may not be binding. They reason that Congress' use of different terminology to describe the settlement procedures of § 2310(a) throughout the MMWA's text and legislative history, combined with the absence of any statutory definition for the terms, establishes that Congress used the terms "dispute settlement procedures" and

"dispute settlement mechanisms" only as generic terms, and thereby included binding arbitration as a type of alternative dispute resolution procedure. The Davises also argue that this court must defer to the FTC regulations, which reject binding arbitration of written warranty claims arising under the MMWA, because the FTC reasonably interpreted the MMWA in these regulations.

We recognize that state and federal courts are sharply divided on whether the MMWA permits pre-dispute binding arbitration of written warranty claims. *Compare Boyd v. Homes of Legend, Inc.,* 981 F.Supp. 1423 (M.D.Ala.1997), *remanded on jurisdictional grounds,* 188 F.3d 1294 (11th Cir.1999), *Wilson v. Waverlee Homes, Inc.,* 954 F.Supp. 1530 (M.D.Ala.1997), *Rhode v. E & T Invs., Inc.,* 6 F.Supp.2d 1322 (M.D.Ala.1998), *Pitchford v. Oakwood Mobile Homes, Inc.,* 124 F.Supp.2d 958 (W.D.Va.2000), *Parkerson v. Smith,* 817 So.2d 529 (Miss.2002), *Browne v. Kline Tysons Imports, Inc.,* 190 F.Supp.2d 827 (E.D.Va.2002), *and Borowiec v. Gateway 2000, Inc.,* 331 Ill.App.3d 842, 265 Ill.Dec. 218, 772 N.E.2d 256 (2002), *with Southern Energy Homes, Inc. v. Ard,* 772 So.2d 1131 (Ala.2000), *Results Oriented, Inc. v. Crawford,* 245 Ga.App. 432, 538 S.E.2d 73 (2000), *aff'd* 273 Ga. 884, 548 S.E.2d 342 (2001), *In re American Homestar of Lancaster, Inc.,* 50 S.W.3d 480 (Tex.2001), *and Howell v. Cappaert Manufactured Hous., Inc.,* 819 So.2d 461 (La.App.2002). The Fifth Circuit is the only circuit court to directly address this issue and, in a divided panel decision, it held that the MMWA permits binding arbitration. *See Walton v. Rose Mobile Homes LLC,* 298 F.3d 470 (5th Cir.

2002).[1] After a thorough review of the MMWA and its legislative history, the FAA and the Supreme Court's application of the FAA to other federal statutes, we conclude that the MMWA permits the enforcement of valid binding arbitration agreements within written warranties.

1. *MMWA*

Congress passed the MMWA in 1975 in response to an increasing number of consumer complaints regarding the inadequacy of warranties on consumer goods. *See* H.R.Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7705-11. The purpose of the MMWA is "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products. . . . " 15 U.S.C. § 2302(a) (1994). In order to advance these goals, § 2310(d) of the MMWA provides a statutory private right of action to consumers "damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract. . . . " *Id.* § 2310(d)(1). Consumers may sue for a MMWA violation in either state or federal court. *Id.*

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[1] In *Cunningham v. Fleetwood Homes of Ga.*, 253 F.3d 611 (11th Cir.2001), this court discussed binding arbitration of MMWA claims. We declined to resolve the question, however, because it was not necessary to the resolution of that case. 253 F.3d at 623-24 ("We are not required to and do not decide whether Magnuson-Moss makes arbitration agreements unenforceable as to all Magnuson-Moss claims. Nor it is necessary for us to determine whether warrantors may include binding arbitration provisions in the warranty itself.").

In order to encourage settlements by means other than civil lawsuits, § 2310(a) allows a warrantor to include a provision for an informal dispute settlement mechanism in a warranty. *Id.* § 2310(a)(3); *see also* H.R.Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7722 ("Congress declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."). Although the MMWA does not define "informal dispute settlement procedure," it does provide that if a warrantor incorporates a § 2310(a) informal dispute settlement procedure into the warranty, the provision must comply with the minimum requirements that the FTC prescribes. 15 U.S.C. § 2310(a)(2). If the informal dispute settlement procedure properly complies with the FTC's minimum requirements, and if the written warranty requires that the consumer "resort to such procedure before pursuing any legal remedy under this section respecting such warranty, the consumer may not commence a civil action . . . under subsection (d) of this section unless he initially resorts to such procedure. . . . " *Id.* § 2310(a)(3).

2. *FAA*

Congress enacted the FAA in 1925 to reverse the longstanding judicial hostility towards arbitration and "to place arbitration agreements on the same footing as other contracts." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 122 S.Ct. 754, 761, 151 L.Ed.2d 755 (2002) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24, 111 S.Ct. 1647, 1651, 114 L.Ed.2d 26 (1991)). Section 2 of the FAA provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1994). The Supreme Court has interpreted § 2 of the FAA as "a congressional declaration of a liberal federal policy favoring arbitration agreements." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 941, 74 L.Ed.2d 765 (1983).

Generally, a court should enforce an arbitration agreement according to its terms, and no exception exists for a cause of action founded on statutory rights. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27, 105 S.Ct. 3346, 3354, 87 L.Ed.2d 444 (1985) (holding that "the Act itself provides no basis for disfavoring agreements to arbitrate statutory claims by skewing the otherwise hospitable inquiry into arbitrability"). In every statutory right case that the Supreme Court has considered, it has upheld binding arbitration if the statute creating the right did not *explicitly* preclude arbitration. *See Gilmer,* 500 U.S. at 35, 111 S.Ct. at 1657 (holding that courts should enforce binding arbitration agreements regarding claims arising under the ADEA); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484-86, 109 S.Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989) (holding that courts should enforce pre-dispute agreements to arbitrate claims under the Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon,* 482

U.S. 220, 238, 242, 107 S.Ct. 2332, 2343, 2345-46, 96 L.Ed.2d 185 (1987) (holding that courts should enforce pre-dispute agreements to arbitrate Securities Exchange Act of 1934 claims and Racketeer Influenced and Corrupt Organizations Act claims); *Mitsubishi Motors Corp.,* 473 U.S. at 628-40, 105 S.Ct. at 3355-61 (holding that courts should enforce arbitration of Sherman Antitrust Act claims in international transactions). "Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue." *Mitsubishi Motors Corp.,* 473 U.S. at 628, 105 S.Ct. at 3354-55. Thus, unless Congress has clearly expressed an intention to preclude arbitration of the statutory claim, a party is bound by its agreement to arbitrate. *Id.* [2]

3. *McMahon Test*

Turning to whether Congress intended to preclude arbitration of a statutory claim, we follow the Supreme Court's *McMahon* test. *McMahon,* 482 U.S. at 226-27, 107 S.Ct. at 2337-38. In *McMahon,* the Supreme Court instructed us to consider three factors in deducing Congress' intent: (1) the text of the statute; (2) its legislative history;

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[2] We understand that arbitration agreements, like any other contract, are subject to general contract law and defenses. "Of course, courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi Motors Corp.,* 473 U.S. at 627, 105 S.Ct. at 3354 (quoting 9 U.S.C. § 2 (1994)). In this opinion, however, we address only the enforcement of binding arbitration agreements under the MMWA absent such other general contract law considerations.

and (3) whether "an inherent conflict between arbitration and the underlying purposes [of the statute]" exists. *Id.* at 227, 107 S.Ct. at 2338. The party opposing the enforcement of the arbitration agreement has the burden of showing that Congress intended to preclude arbitration of the statutory claim. *Id.* In applying the *McMahon* test, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer,* 500 U.S. at 26, 111 S.Ct. at 1652 (quoting *Moses H. Cone Mem'l Hosp.,* 460 U.S. at 24, 103 S.Ct. at 941). Thus, we analyze each factor in turn to determine whether Congress clearly expressed an intention to preclude binding arbitration of MMWA claims.

a. McMahon Factor One: MMWA's Text

The MMWA's text does not expressly prohibit arbitration and, in fact, fails to directly mention either binding arbitration or the FAA. Nevertheless, the Davises argue that the MMWA reserves strictly a judicial forum for consumers by providing a private right of action for consumers. The Supreme Court, however, has held that a statute's provision for a private right of action alone is inadequate to show that Congress intended to prohibit arbitration. *Gilmer,* 500 U.S. at 29, 111 S.Ct. at 1653-54 (rejecting the argument that binding arbitration is improper "because it deprives claimants of the judicial forum provided for by the ADEA"). As the Fifth Circuit recently recognized, "binding arbitration generally is understood to be a *substitute* for filing a lawsuit, not a prerequisite." *Walton,* 298 F.3d at 475 (citing *Mitsubishi Motors Corp.,* 473 U.S. at 628, 105 S.Ct. at 3354) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their

resolution in an arbitral, rather than judicial, forum."). Furthermore, the fact that the MMWA grants a judicial forum with concurrent jurisdiction in state and federal courts for MMWA claims is insufficient evidence that Congress intended to preclude binding arbitration. *See McMahon,* 482 U.S. at 227, 107 S.Ct. at 2338 (rejecting the argument that compulsory arbitration under the Securities Exchange Act of 1934 is improper because the statute provides that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of this title. . . . "); *see also Gilmer,* 500 U.S. at 29, 111 S.Ct. at 1654 (noting that Congress' grant of concurrent jurisdiction in state and federal courts for ADEA claims is consistent with binding arbitration because "arbitration agreements, 'like the provision for concurrent jurisdiction, serve to advance the objective of allowing [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise'") (quoting *Rodriguez de Quijas,* 490 U.S. at 483, 109 S.Ct. at 1921).

The Davises also argue that because § 2310(d) lists only two exceptions to the private right of action, the internal dispute settlement procedure referenced in § 2310(a) and the class action exception referenced in § 2310(e),[3] Congress intended to preclude any other method of dispute resolution, including binding arbitration. *See Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11, 19-20, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979) ("[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading

[3] Section 2310(e) is irrelevant to the present discussion.

others into it. When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode.") (internal quotations and citations omitted). The § 2310(a) exception to a consumer's private right of action states that, if a warrantor establishes an informal dispute settlement procedure, a consumer must resort to the procedure "before pursuing any legal remedy under this section respecting such warranty." 15 U.S.C. § 2310(a)(3)(c). Section 2310(a) also states that "the consumer may not commence a civil action . . . unless he initially resorts to such procedure" and that "[i]n any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence." *Id.* Based on this language, the Davises assert that Congress intended to allow only non-binding alternative dispute resolution procedures. We disagree.

In *Cunningham v. Fleetwood Homes of Ga., Inc.,* we noted that the district court erred "in concluding that, standing alone, the presence of the non-binding § 2310 mechanism in the statutory text requires the conclusion that Magnuson-Moss claims may not be the subject of binding arbitration agreements." 253 F.3d 611, 619 (11th Cir. 2001). The fact that the MMWA regulates § 2310(a) informal dispute settlement procedures does not mean that the Act precludes a court from enforcing a valid binding arbitration agreement. *See id.* at 620 (noting that a statute's provision for one out-of-court settlement mechanism does not necessarily preclude the enforcement of all alternative mechanisms); *see also Gilmer,* 500 U.S. at 29, 111 S.Ct. at 1654 (holding that the ADEA's provision for "out-of-court dispute resolution" is not inconsistent with permitting arbitration under the FAA and that it

even "suggests that out-of-court dispute resolution, such as arbitration, is consistent with the statutory scheme established by Congress"). Thus, we are unpersuaded that Congress intended to bar binding arbitration agreements in the language of the MMWA.

b. McMahon Factor Two: Legislative History

The second factor the Supreme Court instructs us to examine in determining Congress' intent to preclude the application of the FAA is the MMWA's legislative history. *See McMahon,* 482 U.S. at 226-27, 107 S.Ct. at 2338. Like the MMWA's text, its legislative history only addresses "internal dispute settlement procedures;" it never directly addresses the role of binding arbitration or the FAA. In trying to show that Congress intended to bar binding arbitration, the Davises rely on the MMWA's House Report, which notes that "[a]n adverse decision in any informal dispute settlement proceeding would not be a bar to a civil action on the warranty involved in the proceeding." H.R.Rep. No. 93-1107 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7702, 7723.[4] The Davises argue that Congress considered all

[4] The Davises also assert that the Senate intended to bar binding arbitration in the following legislative history:

> For many years warranties have confused and misled the American consumer. A warranty is a complicated legal document whose full essence lies buried in myriads of reported legal decisions and in complicated State codes of commercial law. The consumer's understanding of what a warranty on a particular product means to him frequently does not coincide with the legal meaning. . . . Typically, a consumer today cannot bargain with consumer product manufacturers or suppliers to obtain a warranty or to adjust the terms of a warranty voluntarily offered. Since almost all

(Continued on following page)

methods of dispute resolution, including arbitration, before allowing warrantors to pursue only informal, non-binding settlement procedures. After a thorough reading of the MMWA's legislative history, we disagree.

The Davises have proved only that the MMWA's legislative history is ambiguous at most. When considering a preliminary draft of the MMWA, the Senate reflected that "it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances without the aid of litigation *or formal arbitration.*" S.Rep. No. 91-876, at 22-23 (1970) (emphasis added). As the Fifth Circuit concluded, "there is still no evidence that Congress intended binding arbitration to be considered an informal dispute settlement procedure. Therefore the fact that any informal dispute settlement procedure must be non-binding, does not imply that Congress meant to preclude binding arbitration,

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consumer products sold today are typically done so with a contract of adhesion, there is no bargaining over contractual terms.

S. Rep. No. 93-151, quoted in 40 Fed.Reg. 60168 (1975). Although several other courts have found this language persuasive, *see, e.g., Boyd v. Homes of Legend, Inc.*, 981 F.Supp. 1423, 1439 (M.D.Ala.1997), we do not. Instead, we conclude that this passage only expresses Congress' concerns over the complexities of warranties and the unequal bargaining power between warrantors and consumers. The passage does not, however, prohibit binding arbitration. To hold otherwise would be to revert to a *Wilko* attitude towards arbitration. *See Rodriguez de Quijas*, 490 U.S. at 481, 109 S.Ct. at 1920 ("To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.").

which is of a different nature." *Walton,* 298 F.3d at 476. In *McMahon,* the Supreme Court upheld binding arbitration even though the Securities Exchange Act of 1934's legislative history implied that Congress intended to adopt the *Wilko* attitude that arbitration is an inadequate forum in which to enforce statutory claims. *McMahon,* 482 U.S. at 238, 107 S.Ct. at 2343. Any congressional intent to prohibit arbitration in the MMWA's legislative history is considerably less clear than the legislative history of the Securities Exchange Act of 1934, which the Supreme Court held did not prohibit binding arbitration in *McMahon.* In light of this ambiguity, the Davises fail to carry their burden of showing a clear congressional intent to prohibit binding arbitration of MMWA claims. Thus, given the absence of any meaningful legislative history barring binding arbitration, coupled with the unquestionable federal policy favoring arbitration, we conclude that Congress did not express a clear intent in the MMWA's legislative history to bar binding arbitration agreements in written warranties.

c. McMahon Factor Three: The MMWA's Underlying Purposes

The last *McMahon* factor requires us to examine the purposes of the MMWA to determine whether the MMWA and the FAA conflict. *See McMahon,* 482 U.S. at 226-27, 107 S.Ct. at 2337-38. The MMWA expressly states three purposes: "to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). These purposes are not in conflict with the FAA. In fact, the Supreme Court has repeatedly enforced arbitration of statutory claims where the underlying purpose

of the statutes is to protect and inform consumers. *See, e.g., Basic Inc. v. Levinson,* 485 U.S. 224, 234, 108 S.Ct. 978, 985, 99 L.Ed.2d 194 (1988) (stating that a fundamental purpose of the Securities Acts is the disclosure of information to potential investors); *Rodriguez de Quijas,* 490 U.S. at 485-86, 109 S.Ct. at 1922 (holding that parties may arbitrate Securities Act of 1933 claims); *McMahon,* 482 U.S. at 242, 107 S.Ct. at 2345 (holding that parties may arbitrate Securities Exchange Act of 1934 claims). "[E]ven claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute serves its function." *Green Tree Fin. Corp.-Ala. v. Randolph,* 531 U.S. 79, 90, 121 S.Ct. 513, 521, 148 L.Ed.2d 373 (2000) (citations omitted) (holding that parties may arbitrate Truth in Lending Act claims). Consumers can adequately vindicate their rights arising under the MMWA and written warranties in an arbitral forum. *See Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265, 280, 115 S.Ct. 834, 842, 130 L.Ed.2d 753 (1995) ("Congress, when enacting [the FAA], had the needs of consumers . . . in mind."). Thus, we conclude that the MMWA's consumer protection goals do not conflict with the FAA.

The MMWA's legislative history also indicates that Congress was concerned with addressing the unequal bargaining power between warrantors and consumers with the enactment of the MMWA, thus creating another possible purpose.[5] Unequal bargaining power alone,

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[5] *See* note 4.

however, is not a sufficient reason to never enforce an arbitration agreement of a statutory claim. *Gilmer,* 500 U.S. at 33, 111 S.Ct. at 1655 (stating that "[m]ere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable. . . "). Inequality in bargaining power is a procedural question that courts should analyze on a case by case basis. *Id.; see also McMahon,* 482 U.S. at 230-31, 107 S.Ct. at 2339-40. Thus, unequal bargaining power, like the three declared purposes of the MMWA, does not create such a conflict with the FAA so as to prohibit binding arbitration of MMWA claims.

4. *FTC Regulations and the Chevron Test*

The Davises further argue that we must defer to the FTC regulations, which prohibit binding arbitration. Section 2310(a) authorizes the FTC to promulgate regulations for the MMWA's internal dispute settlement procedures. 15 U.S.C. § 2310(a)(2). The FTC defines "mechanism" as "an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act." 16 C.F.R. § 703.1(e) (2002). The FTC has clearly stated that the mechanism is only a precursor to litigation and never binding. *Id.* § 700.8 ("A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract."). Specifically, the FTC regulations provide that "[d]ecisions of the Mechanism shall not be legally binding on any person." *Id.* § 703.5(j). In its interpretive regulations, the

FTC has defined "mechanism" broadly, to include all non-judicial resolution procedures, including arbitration. *See* 40 Fed.Reg. 60167, 60210 (1975) (stating that binding arbitration is a "*mechanism* [ ] whose decisions would be legally binding"); *see also* 40 Fed.Reg. 60618, 60211 (1975) (stating that a "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act").

In determining whether we should defer to the FTC's interpretation of the MMWA, we look to the Supreme Court's decision of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 843-44, 104 S.Ct. at 2781-82. Under this instruction, we must first determine whether Congress directly addressed binding arbitration under the MMWA. *See id.* If Congress' intent is clear, our inquiry

ends as we must uphold Congress' will. *Id.* If, however, Congress is silent or the statute is ambiguous, we must then decide if the FTC's interpretation is reasonable. *Id.*

a. Congress' intent

"Addressing the first prong of the *Chevron* inquiry . . . we begin by examining the language in the enforcement provision itself." *Smith v. BellSouth Telecomm.*, 273 F.3d 1303, 1307 (11th Cir. 2001). After the previously illustrated thorough examination of the MMWA's text and legislative history, we conclude that Congress failed to directly address binding arbitration anywhere in the text or legislative history of the MMWA.[6] *See* discussion *infra* Parts IV.B.3.a-3.b. Because we believe the intent of Congress is unclear, we must proceed to the second prong of the *Chevron* analysis.

b. Reasonableness of the FTC's construction

The second prong of the *Chevron* inquiry requires us to determine whether the FTC's construction of the statute is reasonable. *See Chevron,* 467 U.S. at 843-44, 104 S.Ct. at 2781-82; *see also Amberg v. FDIC,* 934 F.2d 681, 687 (5th Cir. 1991) ("[W]e will not bow our heads with closed eyes and walk away; rather we must still look at the

[6] In *Walton,* the Fifth Circuit held that because Congress did not evince a clear intent to prohibit arbitration in the MMWA, "[t]he clear congressional intent in favor of enforcing valid arbitration agreements controls in this case." 298 F.3d at 478. Thus, believing that Congress' clear intent in passing the FAA controlled the MMWA, the majority opinion of *Walton* never reached the second prong of the *Chevron* analysis. *Id.* at 478 n. 14.

[agency's interpretations] and see if they can be classified as reasonable.").[7] In determining whether the FTC regulations are reasonable, we look to the rationale behind the FTC's construction. In its legislative regulations, the FTC reasoned that a decision regarding the warranty dispute may not be binding because "section 110(d) of the Act gives state and federal courts jurisdiction over suits for breach of warranty and service contracts." 16 C.F.R. § 700.8. The FTC further explained that binding arbitration agreements are not allowed in written warranties for several reasons:

> First, as the Staff Report indicates, Congressional intent was that decisions of Section 110 Mechanisms not be legally binding. Second, even if binding Mechanisms were contemplated by Section 110 of the Act, the Commission is not prepared, at this point in time, to develop guidelines for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set

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[7] The *Chevron* standard of deference appears to apply only to the FTC's legislative regulations, and not to the FTC's interpretive regulations. *See Walton*, 298 F.3d at 474 n. 7 (discussing the level of deference for legislative regulations versus interpretive regulations). Thus, while we must defer to the legislative regulations in 16 C.F.R. §§ 701.1-703.8 (2002) if they are reasonable, the FTC's interpretive regulations are only "entitled to respect" to the extent they "have the power to persuade." *See Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 1663, 146 L.Ed.2d 621 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944)) (internal quotations omitted); *see also Walton*, 298 F.3d at 474 n. 7.

> out could ensure sufficient protection for consumers.

40 Fed.Reg. 60167, 60210 (1975). In light of the FTC's reasoning, we conclude its rationale is unreasonable and do not defer to it.

In the legislative regulations, the FTC bases its construction on Congress' grant of concurrent jurisdiction. *See* 16 C.F.R. § 700.8. As we previously discussed, a statute's provision for a judicial forum does not preclude enforcement of a binding arbitration agreement under the FAA. *See infra* pp. 1273-74. Thus, the FTC's motive behind the legislative regulation is contradictory to Supreme Court rationale, and we conclude that its interpretation is unreasonable. *See McMahon,* 482 U.S. at 238, 107 S.Ct. at 2343 (refusing to follow Congress' prohibition of arbitration in the Securities Exchange Act of 1934's legislative history when Congress' motive was contradictory to Supreme Court rationale). We also conclude that the FTC's additional rationale is unreasonable. Although the FTC first stated that it looked to a subcommittee staff report (which appears to no longer be attainable) to determine Congress's intent, the FTC continued, evincing its major concern that an arbitral forum will not adequately protect the individual consumers. The Supreme Court in *McMahon,* however, rejected this same hostility shown by the SEC. 482 U.S. at 234 n. 3, 107 S.Ct. at 2341 n. 3 (declining to defer to the SEC's interpretation of the Securities Exchange Act of 1934 based on the SEC's *Wilko* attitude). Instead, the Supreme Court holds that arbitration is favorable to the individual. *See Allied-Bruce Terminix Cos.,* 513 U.S. at 279, 115 S.Ct. at 842-43 (noting that "arbitration's advantages often would seem helpful to

individuals, say, complaining about a product, who need a less expensive alternative to litigation.").

The dissent in *Walton,* which holds that the FTC regulations are reasonable, admits that "deference might be inappropriate if the FTC's concerns about the impact of binding arbitration on consumers were attributable to the Commission's reliance on the Supreme Court's expressed hostility towards arbitration in now-abandoned cases such as *Wilko.*" 298 F.3d at 476 (King, dissenting) (citing *McMahon,* 482 U.S. at 234 n. 3, 107 S.Ct. at 2341 n. 3) (declining to defer to the SEC's interpretation of the Securities Exchange Act of 1934 based on the SEC's admission that its actions were "based on the court of appeals decision following *Wilko,* . . . that agreements to arbitrate Rule 10b-5 claims were not, in fact, enforceable"). The *Walton* dissent distinguishes this case from *McMahon* based on a recent FTC regulatory review statement:

> The Commission examined the legality and the merits of mandatory binding arbitration clauses in written consumer products warranties when it promulgated Rule 703 in 1975. Although several industry representatives at that time had recommended that the Rule allow warrantors to require consumers to submit to binding arbitration, the Commission rejected that view as being contrary to the congressional intent. *The Commission based this decision on its analysis of the plain language of the Warranty Act.*

298 F.3d at 487 (King, dissenting and adding emphasis) (quoting 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999)). In the next paragraph, however, the FTC reaffirms its original rationale that it "is not prepared . . . to develop guidelines

for a system in which consumers would commit themselves, at the time of product purchase, to resolve any difficulties in a binding, but non-judicial, proceeding. The Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999) (citing 40 Fed.Reg. 60167, 60210 (1975)).[8] As we have previously explained, this interpretation is no longer valid based on the Supreme Court's abandonment of its hostile attitude toward arbitration. In light of the Supreme Court's acknowledgment and continual enforcement of the strong federal policy toward arbitration, we conclude this rationale to be based on an impermissible construction of the statute. Thus, we conclude that the FTC's interpretation of the MMWA is unreasonable, and we decline to defer to the FTC regulations of the MMWA regarding binding arbitration in written warranties.

V. CONCLUSION

After a thorough review of the MMWA and the FAA, combined with the strong federal policy favoring arbitration, we hold that written warranty claims arising under the Magnuson-Moss Warranty Act may be subject to valid binding arbitration agreements. Accordingly, we reverse

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[8] The FTC admits that, under the MMWA, "warrantors are not precluded from offering a binding arbitration option to consumers after a warranty dispute has arisen." 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999) (citing 40 Fed.Reg. 60168, 60211 (1975)). As to pre-dispute binding arbitration, however, "[t]he Commission believes that [its original] interpretation continues to be correct." 64 Fed.Reg. 19700, 19708 (Apr. 22, 1999).

the judgment of the district court and remand this case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

MICHAEL SHANE DAVIS, et al.,	)	
Plaintiffs,	)	
	)	**Civil Action No.**
v.	)	**01-D-415-N**
SOUTHERN ENERGY HOMES, INC., et al.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

(Filed Jun. 1, 2001)

On October 12, 1999, Plaintiffs Michael and Heather Davis ("Plaintiffs") purchased a manufactured home, constructed by Defendant Southern Energy Homes, Inc. ("Southern"), from Bilo Homes, Inc. ("Bilo"). Plaintiffs allege that they have discovered multiple defects, for which Southern is responsible, and that Southern has failed to correct the problems. On March 2, 2001, Plaintiffs commenced this action in the Circuit court of Lowndes County, asserting claims against Southern for breach of express and implied warranties, violations of the Magnuson-Moss Warranty-Trade Commission Act ("Magnuson-Moss Act"), 15 U.S.C. §§ 2301, *et seq.*, negligent and wanton repair, and fraud. Plaintiffs assert similar claims against Bilo and Bilo's sales agent.

Defendants removed this case April 6, 2001. (Notice of Removal, Doc. No. 2.) In lieu of an Answer, Southern filed a Motion to Dismiss Or, Alternatively, To Compel Arbitration ("Mot.") on April 20, 2001. The basis for dismissal is

that Plaintiffs' sole remedy is arbitration. Thus, the issue before the court is whether Plaintiffs claims are due to be submitted to arbitration. After careful consideration of the arguments of counsel, relevant law, and the record as a whole, the court finds that Southern's Motion is due to be denied.

I. JURISDICTION

The court exercises jurisdiction over this action pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332, and the Magnuson-Moss Act, 15 U.S.C. § 2310(d).

II. FACTUAL BACKGROUND

In connection with the purchase of their manufactured home, Plaintiffs entered into a binding arbitration agreement with Southern. (McNutt Decl. ¶ 3, Ex. A attached to McNutt Decl.) The agreement provides in relevant part:

> All disputes not barred by the applicable statutes of limitation or otherwise barred by law, resulting from or arising out of the design, manufacture, warranty or repair of the manufactured home, (including but not limited to: the terms of this arbitration agreement and all clauses herein contained, their breath and scope, and any term of any agreement contemporaneously entered into by the parties concerning any goods or services manufactured or provided by Southern Energy Homes, Inc.; the condition of the manufactured home; the conformity of the manufactured home to federal building standards; the representations, promises, undertakings, warranties or covenants made by Southern Energy

> Homes, Inc., (if any); or otherwise dealing with the manufactured home), will be submitted to Binding Arbitration, pursuant to the provisions of 9 U.S.C. section 1 *et seq.*
>
> * * *
>
> Any party to this agreement who fails or refuses to arbitrate in accordance with the terms of this pre-dispute binding arbitration agreement shall, in addition to any other relief awarded through arbitration, be taxed by the arbitrator or arbitrators with all costs, including reasonable attorneys['] fees, of the other party who had to resort to judicial or other means of compelling arbitration in accordance with the terms herein contained.
>
> **THIS ARBITRATION SHALL BE IN LIEU OF ANY CIVIL LITIGATION IN ANY COURT, AND IN LIEU OF ANY TRIAL BY JURY.**

(Ex. A to McNutt Decl.)

In addition, Plaintiffs were given Southern's Owner's Manual in connection with the purchase of their manufactured home. The Manual sets forth Southern's "One Year Limited Warranty," which also contains a binding arbitration provision. (McNutt Decl. ¶ 3, Ex. B to McNutt Decl.) The arbitration provision contained in the Limited Warranty is similar in all material respects to the provisions contained in the binding arbitration agreement.

III. FEDERAL ARBITRATION ACT

Section 2 of the Federal Arbitration Act ("FAA") provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable,

and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[1] 9 U.S.C. § 2. The effect of § 2 is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Section 3 provides for the stay of proceedings in federal district courts when an issue in the proceedings is referable to arbitration. 9 U.S.C. § 3. Section 4 provides for orders compelling arbitration when one party has failed, neglected, or refused to comply with an arbitration agreement. 9 U.S.C. § 4.

Whether an arbitration provision is enforceable is a question of law. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); *Kelly v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 985 F.2d 1067 (11th Cir. 1993). Any doubts about the scope of arbitrable issues should be resolved in favor of arbitration, even if the result is piecemeal litigation. *See Byrd*, 470 U.S. at 218-21; *Moses H. Cone*, 460 U.S. at 24; *Kelly*, 985 F.2d at 1069.

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[1] Plaintiffs do not contest that the contracts in this action satisfy the interstate commerce requirement of the FAA. Further, after an independent review of the record, the court finds sufficient facts to demonstrate this requirement is satisfied. Accordingly, the court finds that, for the purposes of this Memorandum Opinion and Order, Plaintiffs' contracts satisfy this jurisdictional prerequisite of the FAA. *See generally, Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Staples v. Money Tree, Inc.*, 936 F. Supp. 856 (M.D. Ala. 1996).

IV. DISCUSSION

On January 8, 1999, the Supreme Court of Alabama held that the Magnuson-Moss Act precluded enforcement of an arbitration provision as to written warranty claims. *See Southern Energy Homes, Inc. v. Lee*, 732 So.2d 994 (Ala. 1999). The decision was based upon Judge Thompson's reasoning in *Wilson v. Waverlee Homes, Inc.*, 954 F. Supp. 1530 (M.D. Ala. 1997). Seventeen months later, in *Southern Energy Homes, Inc. v. Ard*, 772 So.2d 1131 (Ala. 2000), the Supreme Court of Alabama overruled *Lee*.

In *Yeomans v. Homes of Legend, Inc.*, 2001 WL 237313 (M.D. Ala. 2001), this court declined to follow *Ard*. *Yeomans* reiterated *Waverlee*'s conclusion that Congress intended to preclude binding arbitration of written or express warranty claims arising under the Magnuson-Moss Act. *Id.* at *7. Applying this reasoning, the court found that the plaintiffs in *Yeomans* could be compelled to arbitrate their implied warranty and state law claims, but that the Magnuson-Moss Act mandated that a judicial forum for the plaintiffs' written or express warranty claims. *Id.* at *8.

The court's findings in *Yeomans* resulted in piecemeal litigation – a portion of the plaintiffs' claims in arbitration and a portion of the plaintiffs' claim in court – but the FAA permits such. *See Byrd*, 470 U.S. at 218-21; *Moses H. Cone*, 460 U.S. at 24; *Kelly*, 985 F.2d at 1069. In the instant case, Southern wishes to avoid such a result. Specifically, Southern indicates that it "has no interest in arbitrating some claims and not others." (Reply ¶ 4.) Therefore, knowing that the court is bound by its decision in *Yeomans* as to Plaintiffs' written warranty claims, Southern has elected to resolve all claims, even those

encompassed by the arbitration agreement, in a judicial forum. (*Id.* ¶¶ 3, 4.) Thus, the court need not address Plaintiffs' arguments against arbitration of their own non-warranty and state law claims.

V. ORDER

Based on the foregoing, it is CONSIDERED and ORDERED that Southern's Motion to Dismiss Or, Alternatively, To Compel Arbitration be and the same is hereby DENIED.

DONE this the 1st day of June, 2001.

/s/ Ira DeMent
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-13831-HH

MICHAEL SHANE DAVIS,
HEATHER N. DAVIS, Plaintiffs-Appellees,

versus

SOUTHERN ENERGY HOMES, INC., a corporation, Defendant-Appellant,

BILO HOMES, INC., a corporation
DAVID L. SMITHERMAN Defendant.

On Appeal from the United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ___ F.2d ___).

(Filed Nov. 14, 2002)

Before: ANDERSON and DUBINA, Circuit Judges, and MILLS*, District Judge.

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* Honorable Richard Mills, U.S. District Judge for the Central District of Illinois, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract

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15 U.S.C. § 2302. Rules governing contents of warranties

(a) Full and conspicuous disclosure of terms and conditions; additional requirements for contents. In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty – at whose expense – and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

(b) Availability of terms to consumer; manner and form for presentation and display of information; duration; extension of period for written warranty or service contract. (1)(A) The Commission shall prescribe rules requiring that the terms of any written warranty on a consumer product be made available to the consumer (or prospective consumer) prior to the sale of the product to him.

(B) The Commission may prescribe rules for determining the manner and form in which information with respect to any written warranty of a consumer product shall be clearly and conspicuously presented or displayed so as not to mislead the reasonable, average consumer, when such information is contained in advertising, labeling, point-of-sale material, or other representations in writing.

(2) Nothing in this chapter (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted.

(3) The Commission may prescribe rules for extending the period of time a written warranty or service contract is in effect to correspond with any period of time in excess of a reasonable period (not less than 10 days) during which the consumer is deprived of the use of such consumer product by reason of failure of the product to conform with the written warranty or by reason of the

failure of the warrantor (or service contractor) to carry out such warranty (or service contract) within the period specified in the warranty (or service contract).

(c) Prohibition on conditions for written or implied warranty; waiver by Commission. No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name; except that the prohibition of this subsection may be waived by the Commission if –

(1) the warrantor satisfies the Commission that the warranted product will function properly only if the article or service so identified is used in connection with the warranted product, and

(2) the Commission finds that such a waiver is in the public interest.

The Commission shall identify in the Federal Register, and permit public comment on, all applications for waiver of the prohibition of this subsection, and shall publish in the Federal Register its disposition of any such application, including the reasons therefor.

(d) Incorporation by reference of detailed substantive warranty provisions. The Commission may by rule devise detailed substantive warranty provisions which warrantors may incorporate by reference in their warranties.

(e) Applicability to consumer products costing more than $5. The provisions of this section apply only to

warranties which pertain to consumer products actually costing the consumer more than $5.

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15 U.S.C. § 2309. Procedures applicable to promulgation of rules by Commission.

(a) Oral presentation. Any rule prescribed under this chapter shall be prescribed in accordance with section 553 of title 5; except that the Commission shall give interested persons an opportunity for oral presentations of data, views, and arguments, in addition to written submissions. A transcript shall be kept of any oral presentation. Any such rule shall be subject to judicial review under section 57a(e) of this title in the same manner as rules prescribed under section 57a(a)(1)(B) of this title, except that section 57a(e)(3)(B) of this title shall not apply.

(b) Warranties and warranty practices involved in sale of used motor vehicles. The Commission shall initiate within one year after January 4, 1975, a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles; and, to the extent necessary to supplement the protections offered the consumer by this chapter, shall prescribe rules dealing with such warranties and practices. In prescribing rules under this subsection, the Commission may exercise any authority it may have under this chapter, or other law, and in addition it may require disclosure that a used motor vehicle is sold without any warranty and specify the form and content of such disclosure.

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15 U.S.C. § 2310. Remedies in consumer disputes.

(a) Informal dispute settlement procedures; establishment; rules setting forth minimum requirements; effect of compliance by warrantor; review of informal procedures or implementation by Commission; application to existing informal procedures. (1) Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

(2) The Commission shall prescribe rules setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies. Such rules shall provide for participation in such procedure by independent or governmental entities.

(3) One or more warrantors may establish an informal dispute settlement procedure which meets the requirements of the Commission's rules under paragraph (2). If –

(A) a warrantor establishes such a procedure,

(B) such procedure, and its implementation, meets the requirements of such rules, and

(C) he incorporates in a written warranty a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty,

then (i) the consumer may not commence a civil action (other than a class action) under subsection (d) of this section unless he initially resorts to such procedure; and

(ii) a class of consumers may not proceed in a class action under subsection (d) of this Section except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the named plaintiffs (upon notifying the defendant that they are named plaintiffs in a class action with respect to a warranty obligation) initially resort to such procedure. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure. In any civil action arising out of a warranty obligation and relating to a matter considered in such a procedure, any decision in such procedure shall be admissible in evidence.

(4) The Commission on its own initiative may, or upon written complaint filed by any interested person shall, review the bona fide operation of any dispute settlement procedure resort to which is stated in a written warranty to be a prerequisite to pursuing a legal remedy under this section. If the Commission finds that such procedure or its implementation fails to comply with the requirements of the rules under paragraph (2), the Commission may take appropriate remedial action under any authority it may have under this chapter or any other provision of law.

(5) Until rules under paragraph (2) take effect, this subsection shall not affect the validity of any informal dispute settlement procedure respecting consumer warranties, but in any action under subsection (d) of this section, the court may invalidate any such procedure if it finds that such procedure is unfair.

(b) Prohibited acts. It shall be a violation of section 45(a)(1) of this title for any person to fail to comply with any requirement imposed on such person by this chapter (or a rule thereunder) or to violate any prohibition contained in this chapter (or a rule thereunder).

(c) Injunction proceedings by Attorney General or Commission for deceptive warranty, noncompliance with requirements, or violating prohibitions; procedures; definitions.

(1) The district courts of the United States shall have jurisdiction of any action brought by the Attorney General (in his capacity as such), or by the Commission by any of its attorneys designated by it for such purpose, to restrain (A) any warrantor from making a deceptive warranty with respect to a consumer product, or (B) any person from failing to comply with any requirement imposed on such person by or pursuant to this chapter or from violating any prohibition contained in this chapter. Upon proper showing that, weighing the equities and considering the Commission's or Attorney General's likelihood of ultimate success, such action would be in the public interest and after notice to the defendant, a temporary restraining order or preliminary injunction may be granted without bond. In the case of an action brought by the Commission, if a complaint under section 45 of this title is not filed within such period (not exceeding 10 days) as may be specified by the court after the issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect. Any suit shall be brought in the district in which such person resides or transacts business. Whenever it appears to the court that the ends of justice require that other persons should be parties in

the action, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and to that end process may be served in any district.

(2) For the purposes of this subsection, the term "deceptive warranty" means (A) a written warranty which (i) contains an affirmation, promise, description, or representation which is either false or fraudulent, or which, in light of all of the circumstances, would mislead a reasonable individual exercising due care; or (ii) fails to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care; or (B) a written warranty created by the use of such terms as "guaranty" or "warranty", if the terms and conditions of such warranty so limit its scope and application as to deceive a reasonable individual.

(d) Civil action by consumer for damages, etc.; jurisdiction; recovery of costs and expenses; cognizable claims. (1) Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief –

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

(2) If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be

allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

(3) No claim shall be cognizable in a suit brought under paragraph (1)(B) of this subsection –

(A) if the amount in controversy of any individual claim is less than the sum or value of $25;

(B) if the amount in controversy is less than the sum or value of $50,000 (exclusive of interests and costs) computed on the basis of all claims to be determined in this suit; or

(C) if the action is brought as a class action, and the number of named plaintiffs is less than one hundred.

(e) Class actions; conditions; procedures applicable. No action (other than a class action or an action respecting a warranty to which subsection (a)(3) of this section applies) may be brought under subsection (d) of this section for failure to comply with any obligation under any written or implied warranty or service contract, and a class of consumers may not proceed in a class action under such subsection with respect to such a failure except to the extent the court determines necessary to establish the representative capacity of the named plaintiffs, unless the person obligated under the warranty or service contract is afforded a reasonable opportunity to cure such failure to comply. In the case of such a class action (other than a

class action respecting a warranty to which subsection (a)(3) of this section applies) brought under subsection (d) of this section for breach of any written or implied warranty or service contract, such reasonable opportunity will be afforded by the named plaintiffs and they shall at that time notify the defendant that they are acting on behalf of the class. In the case of such a class action which is brought in a district court of the United States, the representative capacity of the named plaintiffs shall be established in the application of rule 23 of the Federal Rules of Civil Procedure.

(f) Warrantors subject to enforcement of remedies. For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person.

PART 700 – INTERPRETATIONS OF MAGNUSON-MOSS WARRANTY ACT

16 C.F.R. § 700.8: Warrantor's decision as final.

A warrantor shall not indicate in any written warranty or service contract either directly or indirectly that the decision of the warrantor, service contractor, or any designated third party is final or binding in any dispute concerning the warranty or service contract. Nor shall a warrantor or service contractor state that it alone shall determine what is a defect under the agreement. Such statements are deceptive since section 110(d) of the Act

gives state and federal courts jurisdiction over suits for breach of warranty and service contract.

PART 703 – INFORMAL DISPUTE SETTLEMENT PROCEDURES

16 C.F.R. § 703.1 Definitions.

(a) *The Act* means the Magnuson-Moss Warranty – Federal Trade Commission Improvement Act, 15 U.S.C. 2301, et seq.

(b) *Consumer product* means any tangible personal property which is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed).

(c) *Written warranty means*:

(1) Any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(2) Any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise or undertaking becomes part

of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

(d) *Warrantor* means any person who gives or offers to give a written warranty which incorporates an informal dispute settlement mechanism.

(e) *Mechanism* means an informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of Title I of the Act applies, as provided in section 110 of the Act.

(f) *Members* means the person or persons within a Mechanism actually deciding disputes.

(g) *Consumer* means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of a written warranty applicable to the product, and any other person who is entitled by the terms of such warranty or under applicable state law to enforce against the warrantor the obligations of the warranty.

(h) *On the face of the warranty* means:

(1) If the warranty is a single sheet with printing on both sides of the sheet, or if the warranty is comprised of more than one sheet, the page on which the warranty text begins;

(2) If the warranty is included as part of a longer document, such as a use and care manual, the page in such document on which the warranty text begins.

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16 C.F.R. § 703.5. Operation of the Mechanism.

(a) The Mechanism shall establish written operating procedures which shall include at least those items specified in paragraphs (b) through (j) of this section. Copies of the written procedures shall be made available to any person upon request.

(b) Upon notification of a dispute, the Mechanism shall immediately inform both the warrantor and the consumer of receipt of the dispute.

(c) The Mechanism shall investigate, gather and organize all information necessary for a fair and expeditious decision in each dispute. When any evidence gathered by or submitted to the Mechanism raises issues relating to the number of repair attempts, the length of repair periods, the possibility of unreasonable use of the product, or any other issues relevant in light of Title I of the Act (or rules thereunder), including issues relating to consequential damages, or any other remedy under the Act (or rules thereunder), the Mechanism shall investigate these issues. When information which will or may be used in the decision, submitted by one party, or a consultant under section 703.4(b) of this part, or any other source tends to contradict facts submitted by the other party, the Mechanism shall clearly, accurately, and completely disclose to both parties the contradictory information (and its source) and shall provide both parties an opportunity to explain or rebut the information and to submit additional materials. The Mechanism shall not require any information not reasonably necessary to decide the dispute.

(d) If the dispute has not been settled, the Mechanism shall, as expeditiously as possible but at least within

40 days of notification of the dispute, except as provided in paragraph (e) of this section:

(1) Render a fair decision based on the information gathered as described in paragraph (c) of this section, and on any information submitted at an oral presentation which conforms to the requirements of paragraph (f) of this section (A decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, reimbursement for expenses, compensation for damages, and any other remedies available under the written warranty or the Act (or rules thereunder); and a decision shall state a specified reasonable time for performance);

(2) Disclose to the warrantor its decision and the reasons therefor;

(3) If the decision would require action on the part of the warrantor, determine whether, and to what extent, warrantor will abide by its decision; and

(4) Disclose to the consumer its decision, the reasons therefor, warrantor's intended actions (if the decision would require action on the part of the warrantor), and the information described in paragraph (g) of this section. For purposes of paragraph (d) of this section a dispute shall be deemed settled when the Mechanism has ascertained from the consumer that:

(i) The dispute has been settled to the consumer's satisfaction; and

(ii) The settlement contains a specified reasonable time for performance.

(e) The Mechanism may delay the performance of its duties under paragraph (d) of this section beyond the 40 day time limit:

(1) Where the period of delay is due solely to failure of a consumer to provide promptly his or her name and address, brand name and model number of the product involved, and a statement as to the nature of the defect or other complaint; or

(2) For a 7 day period in those cases where the consumer has made no attempt to seek redress directly from the warrantor.

(f) The Mechanism may allow an oral presentation by a party to a dispute (or a party's representative) only if:

(1) Both warrantor and consumer expressly agree to the presentation;

(2) Prior to agreement the Mechanism fully discloses to the consumer the following information:

(i) That the presentation by either party will take place only if both parties so agree, but that if they agree, and one party fails to appear at the agreed upon time and place, the presentation by the other party may still be allowed;

(ii) That the members will decide the dispute whether or not an oral presentation is made;

(iii) The proposed date, time and place for the presentation; and

(iv) A brief description of what will occur at the presentation including, if applicable,

parties' rights to bring witnesses and/or counsel; and

(3) Each party has the right to be present during the other party's oral presentation. Nothing contained in this paragraph (b) of this section shall preclude the Mechanism from allowing an oral presentation by one party, if the other party fails to appear at the agreed upon time and place, as long as all of the requirements of this paragraph have been satisfied.

(g) The Mechanism shall inform the consumer, at the time of disclosure required in paragraph (d) of this section that:

(1) If he or she is dissatisfied with its decision or warrantor's intended actions, or eventual performance, legal remedies, including use of small claims court, may be pursued;

(2) The Mechanism's decision is admissible in evidence as provided in section 110(a)(3) of the Act; and

(3) The consumer may obtain, at reasonable cost, copies of all Mechanism records relating to the consumer's dispute.

(h) If the warrantor has agreed to perform any obligations, either as part of a settlement agreed to after notification to the Mechanism of the dispute or as a result of a decision under paragraph (d) of this section, the Mechanism shall ascertain from the consumer within 10 working days of the date for performance whether performance has occurred.

(i) A requirement that a consumer resort to the Mechanism prior to commencement of an action under

section 110(d) of the Act shall be satisfied 40 days after notification to the Mechanism of the dispute or when the Mechanism completes all of its duties under paragraph (d) of this section, whichever occurs sooner. Except that, if the Mechanism delays performance of its paragraph (d) of this section duties as allowed by paragraph (e) of this section, the requirement that the consumer initially resort to the Mechanism shall not be satisfied until the period of delay allowed by paragraph (e) of this section has ended.

(j) Decisions of the Mechanism shall not be legally binding on any person. However, the warrantor shall act in good faith, as provided in section 703.2(g) of this part. In any civil action arising out of a warranty obligation and relating to a matter considered by the Mechanism, any decision of the Mechanism shall be admissible in evidence, as provided in section 110(a)(3) of the Act.

EXCERPT FROM WARRANTY OF SOUTHERN ENERGY HOMES, INC.

BINDING ARBITRATION IF THE PROBLEM IS STILL NOT RESOLVED

All disputes between us not resolved as outlined above and not barred by applicable statutes of limitations or otherwise barred by law, resulting from or arising out of the design, manufacture, warranty, or repair of the manufactured home, (including but not limited to: the terms of the warranty, the terms of this arbitration agreement, and all clauses herein contained, their breadth and scope, and any term of any agreement contemporaneously entered into by the parties concerning any goods or services manufactured or provided by Southern Energy Homes, Inc.; the condition of the manufactured home; the conformity of the manufactured home to federal building standards; the representations, promises, undertakings, warranties or covenants made by Southern Energy Homes, Inc., (if any); or otherwise dealing with the manufactured home); will be submitted to BINDING ARBITRATION, pursuant to the provisions of 9 U.S.C. section 1, et. seq. and according to the Commercial Rules of the American Arbitration Association then existing in Addison, Alabama, where Southern Energy Homes, Inc., maintains its principal place of business. The Commercial Rules of the American Arbitration Association shall apply except as follows: (a) The party seeking affirmative relief shall prepay all arbitration filing fees and processing fees. (b) In all disputes in which the matter in controversy is $10,000.00 or less, one arbitrator shall be selected (from a list of no less than fifteen arbitrators supplied by the American Arbitration Association) through strikes, in accordance with said Association's Commercial rules. In all disputes in which the matter in

controversy exceeds $10,000.00, the arbitrators shall be selected as follows: Southern Energy Homes, Inc., shall select one arbitrator; the purchaser(s) of the manufactured home shall select one arbitrator; the two arbitrators so selected shall select a neutral arbitrator. In the event any issue is raised in the demand for arbitration or counter demand for arbitration (if any) concerning the design, manufacture, repair or condition of the manufactured home, the neutral arbitrator shall be an individual who shall have been gainfully employed in the design, manufacture or actual repair of manufactured homes, as his or her principal income producing activity, for at least ten years immediately preceding his or her appointment as an arbitrator. Such neutral arbitrator shall be selected by mutual agreement of the arbitrators appointed by the parties. If no agreement on the appointment of such a neutral arbitrator can be agreed upon by the arbitrators appointed by the parties, then the American Arbitration Association shall submit a list of no less than five suitable arbitrators (in accordance with the criteria set forth above), from whom the arbitrators selected shall make their eliminations through the strike method established by the American Arbitration Association. (c) An arbitrator or arbitrators impaneled to hear any dispute brought before them shall be empowered to enter an award of such damages, fees, and costs, as said arbitrator or arbitrators deem just and proper. Notwithstanding, the maximum award permitted, in connection with any dispute submitted to said arbitrator or arbitrators, shall not exceed the amount originally demanded by the party seeking affirmative relief at the time the demand for arbitration is filed. Any party to this agreement who fails or refuses to arbitrate in accordance with the terms of this pre-dispute binding arbitration agreement shall, in addition to any

other relief awarded through arbitration, be taxed by the arbitrator or arbitrators with all of the costs, including reasonable attorney fees, of the other party who had to resort to judicial or other means of compelling arbitration in accordance with the terms herein contained. **THIS ARBITRATION SHALL BE IN LIEU OF ANY CIVIL LITIGATION IN ANY COURT, AND IN LIEU OF ANY TRIAL BY JURY.**

(R1-11-exhibit 1, at 5-6)

Supreme Court, U.S.
FILED
FEB 26 2003
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No. 02-1117

In The
Supreme Court of the United States

MICHAEL SHANE DAVIS AND
HEATHER N. DAVIS,

Petitioners,

v.

SOUTHERN ENERGY HOMES, INC.,
a corporation,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err when it concluded that petitioners had failed to establish that Congress intended the Magnuson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, to override – and therefore partially repeal – the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, which makes the arbitration agreement between petitioners and respondent "valid, irrevocable, and enforceable."

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Southern Energy Homes, Inc. hereby discloses that it has no parent corporation and that no publicly held company holds ten (10%) percent or more of its stock.

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BRIEF OF RESPONDENT IN OPPOSITION

Southern Energy Homes, Inc., ("Southern") respectfully opposes the petition for writ of certiorari. The Court of Appeals held that the Magnuson-Moss Warranty Act ("Warranty Act") does not prohibit binding arbitration of petitioners' dispute with Southern. Petitioners acknowledge that in reaching this conclusion the Court of Appeals utilized this Court's test for determining whether a federal statute prohibits arbitration. They ask this Court to grant their petition to correct the Court of Appeals' alleged "error" in applying that test in this case. Pet. 3. However, even if the Court of Appeals erred in applying this Court's test – and it did not – that fact alone is not a sufficient reason for this Court to grant review. Indeed, this Court should deny the petition. The Court of Appeals' decision is in accord with the decisions of every federal appellate court and state supreme court to resolve the issue. The decision is also correct and fully consistent with this Court's precedent. Finally, and in any event, this case is not a proper vehicle to explore the issues petitioners wish to raise because any consideration of the question presented may well become moot.

STATEMENT

In October 1999, petitioners purchased a mobile home manufactured by Southern. In connection with the sale, Southern extended petitioners a written warranty on the home, which included an agreement to submit all disputes to binding arbitration. Pet. App. 51-53. Petitioners signed an additional arbitration agreement with Southern on October 12, 1999. It is identical in all material respects to the agreement in the warranty.

In contravention of their agreements to arbitrate any dispute, petitioners filed a lawsuit in the Circuit Court for Lowndes County, Alabama, alleging breach of express and implied warranty and violations of the Warranty Act, among other claims. Southern removed the case to the United States District Court for the Middle District of Alabama, and filed a motion to dismiss or, in the alternative, to compel arbitration under the Federal Arbitration Act ("FAA"), which makes arbitration agreements "valid, irrevocable, and enforceable." In response, petitioners argued that the Warranty Act overrides the FAA and prohibits binding arbitration of their claims. They also raised a host of other, unrelated challenges to the enforceability of the arbitration agreement. The district court denied Southern's motion, holding that the Warranty Act prohibits arbitration of written warranty claims. Pet. App. 29-30. The court did not address petitioners' other arguments regarding enforceability of the arbitration clause.

On appeal, the United States Court of Appeals for the Eleventh Circuit reversed. The Court of Appeals explicitly applied the test announced in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), for determining whether a subsequent act of Congress repeals and overrides the FAA. Pet. App. 9 ("we follow the Supreme Court's *McMahon* test") (published at *Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268 (11th Cir. 2002)). Examining in detail the text, legislative history, and purposes of the Warranty Act, the court found no evidence of a congressional intent to override the FAA and prohibit binding arbitration of Warranty Act claims. *Id.* 9-17. Indeed, the court noted, neither the text of the Warranty Act nor its legislative history "mention[s] either binding arbitration or the FAA." *Id.* 10. Nor did the court find any inherent

conflict between the Warranty Act and the FAA. *Id.* 15. Accordingly, the court concluded that the Warranty Act "permits the enforcement of valid binding arbitration agreements within written warranties." *Id.* 6.

After reaching this conclusion, the Court of Appeals turned to petitioners' alternative argument that the court should defer to the Federal Trade Commission's ("FTC") regulations, which purport to interpret the Warranty Act to preclude binding arbitration. *Id.* 17-23. Applying the principles announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court held that the FTC's regulations were unreasonable because they were based on an impermissible construction of the statute. Thus, the court declined to defer to the FTC's construction of the Warranty Act. Pet. App. 23.

Petitioners filed a timely petition for rehearing and rehearing en banc, which the Court of Appeals denied without opinion on November 14, 2002. Pet. App. 31-32. Petitioners did not seek a stay in the Court of Appeals pending the filing of their petition. Therefore, the case was returned to the district court, which is proceeding forward with the case. Petitioners have now once again asked the district court to deny enforcement of the parties' arbitration agreement, this time on the basis of the other grounds previously presented to the court. *See* Plaintiffs' Brief in Opposition to Southern's Motion to Compel Arbitration/Dismiss, *Davis v. Southern Energy Homes, Inc.*, No. 01-F-415-N (M.D. Ala. Jan. 10, 2003). As of the date of this opposition, there has been no ruling by the district court on petitioners' claims.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for several reasons. *First*, the decision of the Court of Appeals does not conflict with any decision of this Court, or of any other court of appeals or state supreme court. Although earlier district court and lower state court decisions had reached inconsistent results, recent developments (including the decision in this case and a decision from the Fifth Circuit), have brought a remarkable degree of uniformity and consistency to the case law. Today, every federal appellate court and state supreme court to consider the question has reached the same conclusion: the Warranty Act does not override the FAA and does not prohibit binding arbitration of consumer warranty claims. There is no reason for this Court to grant review of a petition founded entirely on a claim of error correction.

Second, this case presents a poor vehicle for considering whether the Warranty Act precludes binding arbitration because petitioners continue to argue before the lower courts that the arbitration clause is unenforceable on grounds independent of the question presented by the petition. Should petitioners succeed on any of their arguments, this Court's consideration of whether the Warranty Act permits binding arbitration would become moot.

Third, in any event, the Court of Appeals' decision is correct. Under the FAA, courts must "rigorously enforce agreements to arbitrate," even when faced with statutory claims. *McMahon*, 482 U.S. at 226 (quotation omitted). This presumption in favor of arbitrability of statutory claims can be overcome only if "the party opposing arbitration" proves that "Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." *Id.* at

227. Further, if Congress did intend to preclude arbitration of statutory claims, this intent must be evident in the text, legislative history, *or* "an inherent conflict between arbitration and the statute's underlying purposes." *Id.*

Applying these standards in this case, the Court of Appeals properly held that petitioners had not overcome the presumption in favor of arbitrability of statutory claims. The text of the Warranty Act does not even mention arbitration, much less prohibit it. In fact, the Warranty Act includes an express savings clause that preserves all existing rights and remedies, thus demonstrating a congressional intent to preserve parties' rights and remedies under the FAA.

The legislative history of the Warranty Act similarly fails to reveal a congressional intent to prohibit arbitration. Indeed the only relevant legislative history demonstrates that Congress knew the difference between the informal dispute settlement mechanisms ("IDSMs") authorized by the Warranty Act and arbitration, and expressly contemplated that arbitration would be available (as an alternative to litigation), if efforts through IDSMs failed. Petitioners do not cite this history, relying instead on snippets from the four-year legislative history of the Warranty Act that they claim show that Congress considered and rejected a proposal to allow binding arbitration of Warranty Act claims. But while Congress certainly considered a variety of dispute settlement procedures for the Warranty Act, petitioners found *no evidence* that Congress drafted the Warranty Act expressly to prohibit arbitration.

With no support in the text or legislative history, petitioners rely heavily on an FTC regulation which purports to prohibit binding arbitration of Warranty Act

claims. As this Court recently emphasized, however, administrative policy preferences cannot overrule prior acts of Congress. *FCC v. NextWave Pers. Communications Inc.*, 123 S. Ct. 832, 840 (2003). In any event, even if the FTC had been delegated authority to overrule a prior act of Congress – and it has not been – its views would not be entitled to deference under *Chevron* because they rest on an outmoded hostility to arbitration that has since been rejected by this Court.

I. THERE IS NO CONFLICT THAT REQUIRES RESOLUTION BY THIS COURT.

Almost as an afterthought at the end of their submission, petitioners suggest that this Court should grant the petition to resolve an important conflict in the lower courts. Although the question presented is certainly an important one, petitioners fail to explain that over the last year, federal and state courts have reached essentially a uniform consensus on that question. Indeed, the pre-existing division in the lower courts has virtually disappeared in the wake of recent decisions, including the decision in this case, that together have brought a remarkable degree of consistency to the law.[1] Thus, there is

[1] The decision in this case overruled contrary district court precedent from Alabama, and the Fifth Circuit's decision in *Walton v. Rose Mobile Homes, Inc.*, 298 F.3d 470 (5th Cir. 2002) – which, like *Davis*, held that the Warranty Act permits binding arbitration – overruled contrary district court precedent from Mississippi. Although the Illinois Appellate Court held that the Warranty Act precludes binding arbitration, *Borowiec v. Gateway 2000, Inc.*, 772 N.E.2d 256 (Ill. App. Ct. 2002), the Illinois Supreme Court has accepted an appeal from that decision, which remains pending. *Borowiec v. Gateway 2000, Inc.*, No. 94235 (Ill. Nov. 2002).

no conflict to resolve because every federal appellate court and state supreme court to decide the question has held, consistent with the Court of Appeals in this case, that the Warranty Act does not prohibit binding arbitration. *Davis*, Pet. App. 2; *Walton v. Rose Mobile Homes, Inc.*, 298 F.3d 470 (5th Cir. 2002); *In re American Homestar of Lancaster, Inc.*, 50 S.W.3d 480 (Tex. 2000); *Southern Energy Homes, Inc. v. Ard*, 772 So. 2d 1131 (Ala. 2000); *see also Results Oriented, Inc. v. Crawford*, 538 S.E.2d 73 (Ga. Ct. App. 2000), *aff'd on other grounds*, 548 S.E.2d 342 (Ga. 2001); *Howell v. Cappaert Manufactured Hous., Inc.*, 819 So. 2d 461 (La. Ct. App. 2002).

In light of these developments, the *only* aberrant jurisdictions that still adopt the position advocated by petitioners (*i.e.*, that the Warranty Act precludes arbitration) are two federal district courts and one state trial court in Virginia, all of which issued their decisions before *Davis* and *Walton* and relied on the district court decisions expressly overruled by *Davis* and *Walton*.[2]

In search of a split in authority, petitioners seek refuge in the Mississippi Supreme Court's decision in *Parkerson v. Smith*, 817 So. 2d 529 (Miss. 2002), but that decision does not help them. In *Parkerson*, an evenly divided Mississippi Supreme Court affirmed an intermediate appellate court's holding that the FAA did not mandate enforcement of arbitration clauses within written warranties. However, *Parkerson* is not even legally binding in

[2] *See Browne v. Kline Tysons Imports, Inc.* 190 F. Supp. 2d 827 (E.D. Va. 2002); *Pitchford v. Oakwood Mobile Homes, Inc.*, 124 F. Supp. 2d 958 (W.D. Va. 2000); *Philyaw v. Platinum Enters., Inc.*, No. CL00-236, 2001 WL 112107 (Va. Cir. Ct. Jan. 9, 2001).

Mississippi on this point because only four of eight Justices approved this holding; three Justices clearly rejected it and one Justice expressed no opinion on the matter. *See Buffington v. Mississippi*, 824 So. 2d 576, 580 (Miss. 2002) ("It is true that a majority of all sitting judges is required to create precedent, and therefore, it follows that a plurality vote does not create a binding result."). In any event, the *Parkerson* plurality relied on the district court decisions that have now been expressly overruled by *Davis* and *Walton*.

In sum, there is no split for this Court to resolve.

II. THIS CASE IS AN INAPPROPRIATE VEHICLE TO CONSIDER THE QUESTION PRESENTED.

After this case returned to the district court following the Court of Appeals' decision, the district court issued an order to show cause why it should not grant Southern's motion to compel arbitration. In response to this order, petitioners filed a lengthy brief reciting various reasons why the arbitration clause is unenforceable. This brief (largely recycled from their earlier pleading in the district court) argued that the arbitration clause is unenforceable because (1) it violates various other provisions of the Warranty Act, (2) it violates the rules of the American Arbitration Association, and (3) it violates the Seventh Amendment and the Commerce Clause of the United States Constitution. Southern responded to these arguments, and these issues remain pending before the district court.

Although Southern believes that the arbitration clause is fully enforceable as written, if the district court

accepts any of petitioners' arguments, the arbitration clause would be unenforceable for reasons completely independent of the issue presented in this petition. Therefore, before this Court could even decide whether the Warranty Act prohibits binding arbitration, that issue might well become moot. In light of this possibility, this case is a poor candidate for resolving the question presented.

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE WARRANTY ACT DOES NOT PROHIBIT ARBITRATION.

The central issue in this case is whether Congress in enacting the Warranty Act partially repealed the FAA, which otherwise makes all agreements to arbitrate "valid, irrevocable, and enforceable." Because implied repeal of statutes is disfavored, when – as here – "two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *NextWave*, 123 S. Ct. at 840 (quoting *J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 143-44 (2001)).

As applied in the context of the FAA, this Court has repeatedly instructed courts that they may not find that a subsequent act of Congress overrides the FAA unless Congress "*explicitly* preclude[s] arbitration" of claims under the later-enacted statute. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 29 (1991) (emphasis added). Furthermore, the party seeking to avoid arbitration (here, petitioners) bears the burden of demonstrating that Congress clearly intended to preclude arbitration, an intent that, if it exists at all, must be found in "[the statute's] text or legislative history, or from an inherent conflict between arbitration and the statute's

underlying purposes." *McMahon*, 482 U.S. at 227 (citation omitted). Evidencing the stringent nature of these requirements, no decision of this Court holds that Congress intended a later act to repeal the FAA and prohibit arbitration.

The Warranty Act is no exception. There is nothing in the text, legislative history, or purposes of the Act that demonstrates a congressional intention to prohibit arbitration.

A. Neither the Text, Legislative History, nor Purposes of the Warranty Act Demonstrates a Clear Congressional Intent to Prohibit Arbitration.

1. The plain language of the Warranty Act does not repeal the FAA or prohibit arbitration of consumer warranty disputes. In fact, the text and stated purpose of the Warranty Act do not mention arbitration at all. In other words, nowhere in the language of the Warranty Act does Congress expressly preclude binding arbitration of consumer claims arising under the Act, or even suggest that arbitration of consumer warranty claims was a congressional concern. *See Davis*, Pet. App. 10; *Walton*, 298 F.3d at 475-76.

Indeed, a separate provision of the Act definitively repudiates any argument that Congress intended to preclude arbitration of Warranty Act claims. Section 111(b)(1) of the Act, 15 U.S.C. § 2311(b)(1), states that "[n]othing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." Congress explicitly preserved consumers' existing rights to arbitrate claims under the FAA,

including the right to enforce arbitration agreements to which the consumer is a party. *See Allied-Bruce Terminix Cos., Inc. v. Dobson,* 513 U.S. 265, 281 (1995) (recognizing that ability to enforce arbitration agreements is an important right for consumers). This provision thus expressly negates any implied repeal of the FAA, and the rights and remedies it protects, by the Warranty Act.

Moreover, to conclude as petitioners do, that Congress foreclosed *any* arbitration remedy, a court would necessarily have to find that Congress preempted each state's adoption of the Uniform Arbitration Act, which, like the FAA, makes arbitration agreements binding and enforceable without regard to the subject matter of the parties' dispute. Principles of federalism, however, preclude a finding of preemption unless that was the "clear and manifest intent" of Congress, a standard that petitioners have not even attempted to demonstrate in this case. *See Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 530 (2002).

Conspicuously, petitioners do not even cite the savings clause, much less point to any finding that Congress clearly intended to preempt state arbitration laws and deprive consumers of the important rights and remedies those laws provide. And for good reason. The broad savings clause of Section 111(b) makes such a finding absolutely impossible. For it expressly instructs courts *not* to interpret the statute in precisely the manner petitioners do.

In the absence of any direct language precluding arbitration and with no discussion of the savings clause, petitioners rely on three arguments to support their assertion that the Warranty Act prohibits binding arbitration. None of these arguments support their cause.

First, petitioners rely on Section 110 of the Warranty Act, 15 U.S.C. § 2310, which authorizes warrantors to create an informal dispute settlement mechanism, and argue that arbitration must fall within the scope of this new IDSM. As petitioners correctly concede, however, the Warranty Act does not define the term IDSM, Pet. 4, and thus petitioners' argument rests entirely on inferences. Yet, as this Court has repeatedly held, inference is not enough. A subsequent act of Congress does not repeal the FAA unless Congress "explicitly" precludes arbitration. *Gilmer*, 500 U.S. at 29.

In any event, petitioners' argument is meritless. Section 110 is concerned with establishment of IDSMs, not arbitration. Section 110 provides that Congress "declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms," and designates the FTC to prescribe rules "setting forth minimum requirements for any informal dispute settlement procedure which is incorporated into the terms of a written warranty to which any provision of this chapter applies." 15 U.S.C. § 2310(a)(2). The gist of the new IDSM under Section 110 is to allow a warrantor to incorporate in its written warranty "a requirement that the consumer resort to such procedure before pursuing any legal remedy under this section respecting such warranty," in which case the consumer "may not commence a civil action (other than a class action)" under the remedies provision of Section 110(d) without first resorting to that procedure. *Id.* § 2310(a)(3)(C). *See also id.* § 2310(d)(1).

Therefore, in enacting the Warranty Act, Congress gave consumers a new statutory cause of action and provided warrantors with the option of establishing

IDSMs that consumers would need to use *before* pursuing the new remedy. However, the mere fact that Congress provided consumers with a remedy that could arise after completing an IDSM does not mean that consumers could not choose to pursue that statutory remedy in an arbitration proceeding rather than a judicial forum. Indeed, the Warranty Act's language allowing consumers to choose a *state* or *federal* forum for their disputes is consistent with the conclusion that Congress intended to allow for arbitration of consumer disputes under the Act. That is because the provision for concurrent state and federal jurisdiction reflects a congressional desire to "allow[] [claimants] a broader right to select the forum for resolving disputes, whether it be judicial or otherwise." *Gilmer*, 500 U.S. at 29 (second alteration in original) (quotation omitted).

Moreover, allowing warrantors to establish an IDSM that they may require consumers to resort to as a prerequisite to filing a lawsuit does not evince a congressional intent to preclude *arbitration*. For the Warranty Act speaks only of an "informal dispute settlement mechanism." As both the Third and Fifth Circuits have explained, arbitration is not the same as an IDSM. *Walton*, 298 F.3d at 476 ("binding arbitration is not normally considered to be an 'informal dispute settlement procedure'"); *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 351 (3rd Cir. 1997) ("[T]he informal dispute resolution mechanism provided [by the Warranty Act] *does not constitute arbitration* within the meaning of the FAA.") (emphasis added). Furthermore, while the Warranty Act provides for an IDSM, it also states that that procedure must be used *before* filing suit in court; arbitration, however, is "generally . . . understood to be a *substitute* for filing a lawsuit, not a prerequisite." *Walton*, 298 F.3d at 475-76.

The words Congress chose in Section 110 show that Congress did not equate IDSMs with arbitration, as petitioners do in this case. Section 110 refers to an "informal" process, but arbitration is a formal proceeding, complete with rules and procedures to govern the conduct of the proceedings. *See, e.g.*, American Arbitration Association, http://www.adr.org (the rules referred to in Southern's arbitration clause). Moreover, Section 110 governs only informal "*settlement*" procedures. Arbitration is not a "settlement" procedure in any ordinary sense of that word. Arbitration is a formal proceeding for the final and binding *adjudication* of a claim. The outcome, unlike a settlement, is not voluntarily agreed upon; it is decided by an independent third party after a hearing and presentation of evidence. *See Rush Prudential HMO, Inc. v. Moran*, 122 S. Ct. 2151, 2168 (2002). In short, unlike an IDSM, arbitration "walks, talks, and squawks very much like a lawsuit." *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 122 S. Ct. 1864, 1873 (2002) (quoting lower court opinion).

Second, petitioners argue that because some individuals included arbitration when they used the phrase "dispute settlement procedures," this Court should infer that Congress did so as well. Like petitioners' first argument, this argument is based on inference, and inference alone. It thus fails to meet the standards enunciated in *McMahon* and *Gilmer*: a statute precludes arbitration only when it "*explicitly* precludes arbitration." *Gilmer*, 500 U.S. at 29 (emphasis added).

Moreover, the inferences actually work *against* petitioners. Congress was keenly aware of the terms "arbitration" and "alternative dispute resolution" when it enacted

the Warranty Act. Those procedures were well known and in wide use at the time of the Act's passage. Yet, notably, Congress *never* used either of those terms in the Warranty Act, clearly indicating that Congress was talking about something else. By using the new term "IDSM," rather than a broad generic term such as "ADR," Congress thus signaled that it was referring to a more limited and newly created process, wholly distinct from existing procedures such as arbitration. *See Harrison*, 111 F.3d at 351.

Third, petitioners contend that because Congress created – and regulated – IDSMs, it must have intended to preclude any other procedure, such as arbitration, that would be exempt from IDSM regulations. Pet. 7-9. This argument fundamentally misstates the standard announced by this Court for determining whether Congress intended to prohibit arbitration. Instead of asking, as directed by *McMahon*, whether the Warranty Act unambiguously and explicitly *prohibits* arbitration, plaintiffs comb through the text for evidence on whether Congress intended to *allow* arbitration. *See* Pet. 7 ("Having permitted warrantors to create [IDSMs] . . . , did Congress intend to permit warrantors to create similar procedures that are exempt from FTC regulation?").

This line of reasoning turns the analytic framework upside down. For this Court has held that statutory causes of action must be arbitrated notwithstanding the lack of *any* provision in the statute allowing arbitration. This Court has expressly and repeatedly declared that Congress does *not* demonstrate an intent to prohibit arbitration merely by providing a statutory cause of action that expressly allows an injured party to sue in a judicial forum, or by providing for an extra-judicial method of resolving claims, *Gilmer*, 500 U.S. at 26, 29; *McMahon*,

482 U.S. at 232. Indeed, in *Gilmer*, this Court held that congressional creation of an informal dispute resolution mechanism suggests that arbitration is consistent with the statutory scheme. *Gilmer*, 500 U.S. at 29. That is because the question is not – as petitioners would have it – whether Congress expressed an intent to allow arbitration, but rather whether Congress expressed an intent to prohibit arbitration.

In sum, when the correct question is asked, an analysis of the text of the Warranty Act demonstrates that Congress did not express an intent to prohibit binding arbitration of consumer warranty claims.

2. As with its text, there is not a shred of evidence in the Warranty Act's legislative history that suggests Congress intended to preclude arbitration. In fact, the relevant legislative history shows that Congress knew the difference between arbitration and IDSMs and expressly contemplated arbitration of consumer warranty claims that could not be settled informally. Senators Magnuson and Moss introduced the first version of a consumer warranty bill in 1969. In 1970, the Senate Committee on Commerce issued a report interpreting the language of this forerunner of the Warranty Act. S. Rep. No. 91-876 (1970). That Senate Report states that "it is Congress' intent that warrantors of consumer products cooperate with government and private agencies to establish informal dispute settlement mechanisms that take care of consumer grievances *without the aid of litigation or formal arbitration.*" *Id.* at 22-23 (emphasis added). Congress thus clearly understood that litigation and arbitration were equivalent alternatives if informal dispute *settlement* efforts failed.

Petitioners do not cite this Report, preferring instead to scour the Warranty Act legislative history for support, an undertaking that one judge has called "the legal equivalent of an archaeological dig." *Skelton v. General Motors Corp.*, 500 F. Supp. 1181, 1184 (N.D. Ill. 1980), *rev'd on other grounds*, 660 F.2d 311 (7th Cir. 1981). Based on their archaeological research, petitioners infer from scattered (and selective) comments, that Congress purportedly considered – and rejected – a proposal to allow binding arbitration of Warranty Act claims. While petitioners point to evidence that Congress considered different types of dispute settlement procedures, they point to no evidence that Congress drafted the Warranty Act to *prohibit* arbitration. Put another way, after "entering a crowded cocktail party and looking over the heads of the guests for [their] friends," petitioners came up short. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). They were unable to find even a *single* reference to a congressional intent to prohibit binding arbitration.

Under the *McMahon* test, petitioners' failure to identify any clear legislative history expressing a congressional intent to prohibit binding arbitration dooms their argument, for this Court has held that a subsequent act of Congress overrides the FAA's command to enforce arbitration agreements only when Congress "*explicitly* preclude[s] arbitration." *Gilmer*, 500 U.S. at 29 (emphasis added).

Even taking petitioners' research at face value, the fact that some people may on occasion use the phrase "dispute settlement procedures" as encompassing arbitration falls far short of the type of unambiguous evidence necessary to conclude that Congress itself intended to preclude binding arbitration. In *McMahon*, this Court set the standard for evaluating evidence of legislative history,

and it set the standard quite high. In that case, this Court upheld binding arbitration in cases arising under the Securities Exchange Act of 1934, even though the legislative history of that statute strongly suggested that Congress had intended to adopt this Court's now-repudiated holding in *Wilko v. Swan*, 346 U.S. 427 (1953), that arbitration was an inadequate forum for the resolution of statutory claims. Thus, even though the Conference Report for the 1934 Act expressly stated that the "amendment did not change existing law, as articulated in *Wilko v. Swan*, 346 U.S. 427 (1953), concerning the effect of arbitration proceedings provisions in agreements," this Court concluded that this explicit legislative history was insufficient to override the FAA. *McMahon*, 482 U.S. at 236-39. Since petitioners' legislative history evidence is considerably less clear than the explicit statement in a Conference Report that this Court found wanting in *McMahon*, it cannot, by comparison, demonstrate congressional intent to prohibit arbitration. Not surprisingly, petitioners make no attempt to reconcile their use of legislative history with the standard established in *McMahon*.

As with the text of the Warranty Act, therefore, there is absolutely no evidence from its legislative history that Congress intended to prohibit arbitration or override the provisions of the FAA. To the contrary, the only proper evidence of the Act's legislative history shows that Congress harbored no such intent.

3. Petitioners do not address the final part of the *McMahon* inquiry (whether arbitration conflicts with the Warranty Act's purposes), perhaps because it would be futile to argue that there is any conflict between arbitration and the Warranty Act's express purpose "to improve the adequacy of information available to consumers,

prevent deception, and improve competition in the marketing of consumer products." 15 U.S.C. § 2302(a). As this Court has repeatedly reminded courts, "by agreeing to arbitrate . . . a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (quoting *Gilmer*, 500 U.S. at 26).

There is, in fact, "no inherent conflict between the [Warranty Act] and the FAA." *Walton*, 298 F.3d at 478. Indeed, arbitration promotes the purposes of the Warranty Act insofar as it provides consumers with a cost-effective, streamlined procedure to resolve their claims. Because the FAA and the Warranty Act are "two statutes . . . capable of co-existence," it is this Court's "duty" to regard "each as effective." *NextWave*, 123 S. Ct. at 840. That is precisely what the Court of Appeals did in this case.

B. The Court of Appeals Rightly Declined to Defer to the FTC's Unreasonable Interpretation of the Warranty Act.

Given the lack of any text, history, or purpose to support its interpretation of the Warranty Act, petitioners seize on an FTC regulation, 16 C.F.R. § 703.5, and the FTC's statements about that regulation, to argue that the Warranty Act overrides the FAA and prohibits arbitration of Warranty Act claims. Reliance on these FTC statements is unwarranted, however, because the FTC's views are irrelevant to the *McMahon* standard, and in any event, they are not entitled to any deference.

1. Although the FTC has authority to implement portions of the Warranty Act, it has no authority to interpret the Warranty Act to override the FAA. Under the *McMahon* standard, it is the intent of Congress, not an agency, that is determinative in deciding whether a subsequently enacted statute abrogates the FAA's emphatic federal policy making arbitration agreements binding, irrevocable, and enforceable. *See McMahon*, 482 U.S. at 234 n.3 (rejecting reliance on long-standing agency rule that Exchange Act precluded arbitration). Thus, the Fifth Circuit rejected reliance on the FTC's regulations, stating that "[a]n agency's regulations, promulgated pursuant to a statute, are not part of [the *McMahon*] test." *Walton*, 298 F.3d at 479. Simply put, because an agency's regulations cannot determine whether one Congress intended to override the acts of a prior Congress, they are simply irrelevant to the central question governed by the *McMahon* test.

This conclusion – that agency interpretations are irrelevant under the *McMahon* standard – is merely an application of the basic principle, recently reaffirmed by this Court in *NextWave*, that an agency may not interpret a statute to deny the clear rights provided in a different act of Congress. As this Court expressly held in *NextWave*, "administrative preferences cannot be the basis for denying respondent rights provided by the plain terms of a law." 123 S. Ct. at 840; *see Recent Case, Arbitration – Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation*, 116 Harv. L. Rev. 1201, 1205 (Feb. 2003) ("Congress cannot delegate to an agency the authority to override congressional statutes.").

Similarly, here, the FAA makes agreements to arbitrate "valid, irrevocable, and enforceable," 9 U.S.C. § 2, and this guarantee provides significant rights for consumers and other signatories to arbitration agreements. *See Terminix*, 513 U.S. at 281. Nevertheless, as in *NextWave*, the FTC has interpreted the Warranty Act to prohibit binding arbitration of claims arising under that Act, thereby denying consumers and warrantors their rights under the plain terms of the FAA. Because, as in *NextWave*, the Warranty Act does not *require* this interpretation, the FTC's policy preference "cannot be the basis for denying . . . rights provided by the plain terms of the law." 123 S. Ct. at 840. In short, because there is no inherent conflict between the Warranty Act and the FAA, this Court has a duty to regard each as effective, regardless of the FTC's preference to the contrary.[3] *Id.* at 840.

2. Even if the FTC's regulation were relevant to determining whether one act of Congress (the Warranty Act) overrides another act (the FAA), the Court of Appeals properly declined to defer to the FTC's views. An agency's interpretation is entitled to *Chevron* deference only if

[3] The cases cited by petitioners are not to the contrary. Pet. 22. In *United States v. Alaska*, 503 U.S. 569, 585-86 (1992), this Court expressly held that the agency's action under one statute (the Rivers and Harbors Act) *did not alter* rights or guarantees under a different federal statute (the Submerged Lands Act). Similarly, in *Norfolk & Western Ry. Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117 (1991), the relevant statute expressly provided that the agency's actions exempted the affected parties from all other laws. In other words, Congress expressly authorized the agency to take action that would have the effect of overriding other laws. Because the Warranty Act does not expressly authorize the FTC to override other laws, much less the FAA, *Norfolk & Western* does not help petitioners.

Congress has not spoken to the precise question at issue – if, in other words, the statute is silent or ambiguous on the topic. *Yellow Transp., Inc. v. Michigan*, 123 S. Ct. 371, 377 (2002); *see Chevron*, 467 U.S. at 843-44. But here, if the Warranty Act is silent or ambiguous regarding arbitration, then, by definition, Congress has not clearly expressed its intent to override the FAA as required by *McMahon*. *See supra* at 9-10. In short, the factual predicate for *Chevron* deference – silence or ambiguity in the statutory language – refutes any argument that Congress explicitly precluded arbitration, as required by *McMahon*, when it enacted the Warranty Act.

3. In any event, the FTC's interpretation is unreasonable. Section 703.5(j) of the FTC's regulations provides that "[d]ecisions of the [IDSMs] shall not be legally binding on any person." Although the FTC never expressly states that "IDSM" should be interpreted broadly to include all non-judicial dispute resolution processes (including arbitration), the FTC has indicated that it interprets Section 703.5(j) to preclude binding arbitration. *See* 40 Fed. Reg. 60,168, 60,210 (Dec. 31, 1975). The FTC explained that it had adopted this interpretation because "[t]he Commission is not now convinced that any guidelines which it set out could ensure sufficient protection for consumers." *Id.* In 1999, the FTC reaffirmed this original rationale, stating expressly that it "believes that this interpretation continues to be correct." 64 Fed. Reg. 19,700, 19,708 (Apr. 22, 1999). The FTC further stated that its interpretation rested on the language of the Act providing that "the consumer may not commence a civil action . . . unless he initially resorts to such [informal dispute settlement] procedure." *See id.* (quoting 15 U.S.C. § 2310(a)(3)). According to the FTC, "this language clearly

implies that a mechanism's decision cannot be legally binding, because if it were, it would bar later court action." *Id.* (emphasis added).

The Court of Appeals properly held that the FTC's asserted justifications for its regulation are unreasonable because they all conflict with this Court's precedent.[4] *See Davis*, Pet. App. 19-23. The FTC's 1975 statement that arbitration might not adequately protect consumers is based on an inappropriate hostility to arbitration, and therefore an impermissible reading of the statute. As the Court of Appeals recognized, this Court "in *McMahon* . . . rejected this same hostility shown by the SEC." *Id.* 21; *see McMahon*, 482 U.S. at 234 n.3.

Furthermore, the FTC's 1999 statement that the language of Section 110 "clearly *implies* that a mechanism's decision cannot be legally binding," is similarly inconsistent with this Court's precedent. For, even if arbitration were deemed an IDSM – which defies all evidence to the contrary – mere "implication" is *never* enough to override the provisions of the FAA. *See Gilmer*, 500 U.S. at 27-33; *McMahon*, 482 U.S. at 236-38.

Finally, if it is the FTC's position that the provision of a civil remedy in Section 110(d) precludes arbitration, that rationale also cannot survive modern precedent interpreting the arbitration of statutory claims under the FAA. This Court has repeatedly rejected arguments that claims

[4] Petitioners criticize the Court of Appeals for mistakenly labeling Section 703.5(j) an "interpretive" regulation, but this minor drafting error does not undermine the court's comprehensive analysis of the FTC's regulations.

under employment discrimination laws, the federal antitrust laws, RICO, and the securities laws, all of which provide for civil actions just like Section 110(d), are not subject to arbitration. This precedent requires that Section 110 of the Warranty Act be interpreted as providing an informal, non-binding settlement mechanism to be followed by arbitration *or* a civil action if the consumer were dissatisfied with the informal settlement result. *See Gilmer*, 500 U.S. at 29.[5]

At base, the FTC and petitioners have each made the same mistake. They have failed to accept, or even acknowledge, what this Court has repeatedly emphasized about arbitration – namely, that an agreement to arbitrate does not result in a loss of substantive rights, but merely transfers a dispute concerning those substantive rights from a judicial to an arbitral forum. Because "the FTC's motive behind [those] regulation[s] is contradictory to Supreme Court rationale," the Court of Appeals properly

[5] Indeed, the basis for this interpretation of Section 110 is even more compelling here than in *McMahon* because the statute there – unlike the Warranty Act – contained a provision that expressly prohibited parties from waiving provisions of the Act. The SEC had interpreted this non-waiver provision as prohibiting pre-dispute arbitration agreements because the SEC believed such an agreement constituted a waiver of the provisions of the Act granting injured parties the right to file a civil action. This Court rejected that argument, recognizing that "arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision," and that the "streamlined procedures of arbitration do not entail any consequential restriction on substantive rights." *McMahon*, 482 U.S. at 232.

concluded that the FTC's regulations are entitled to no deference. *Davis*, Pet. App. 21.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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